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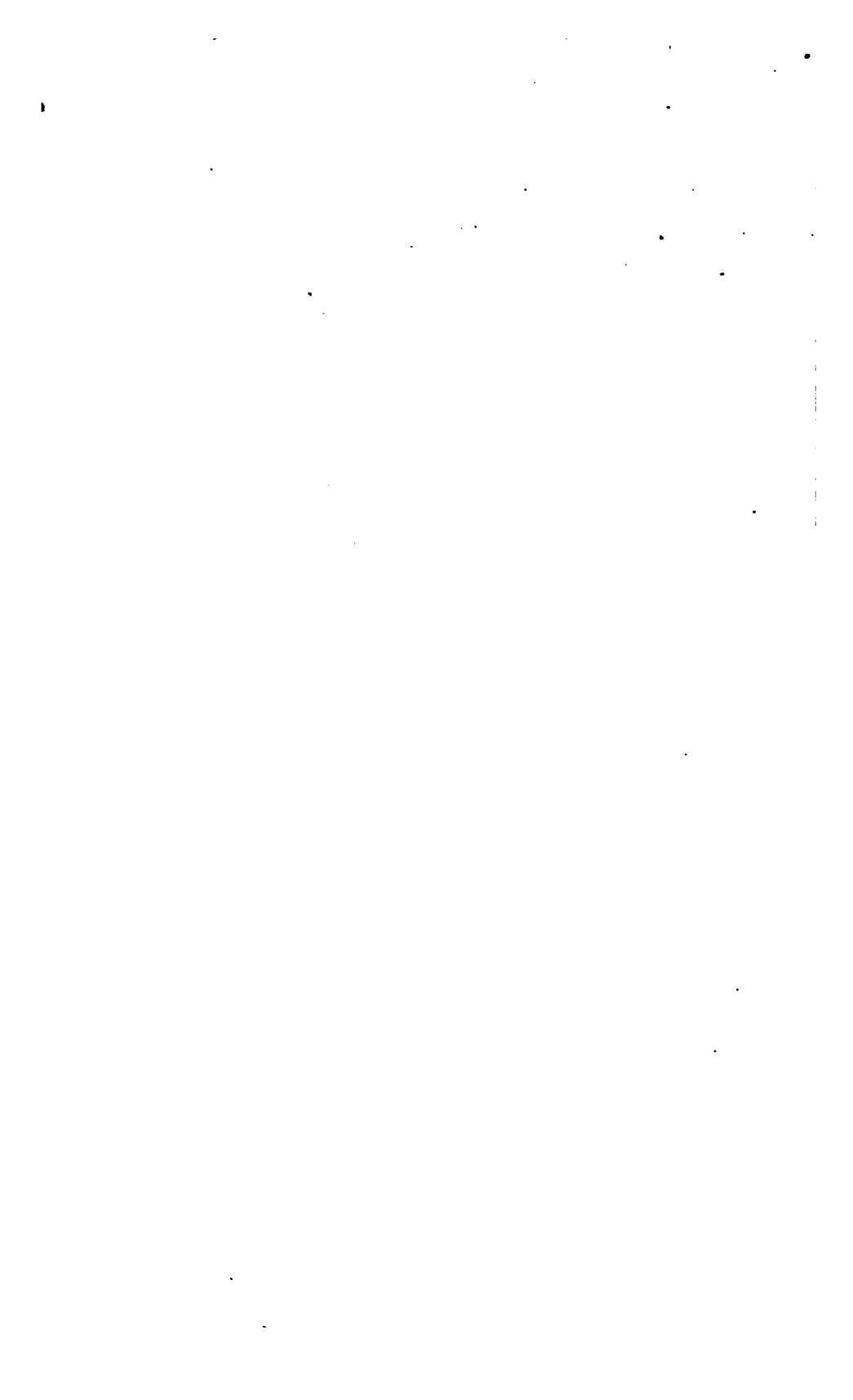
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VOL. 19—LOUISIANA REPORTS.

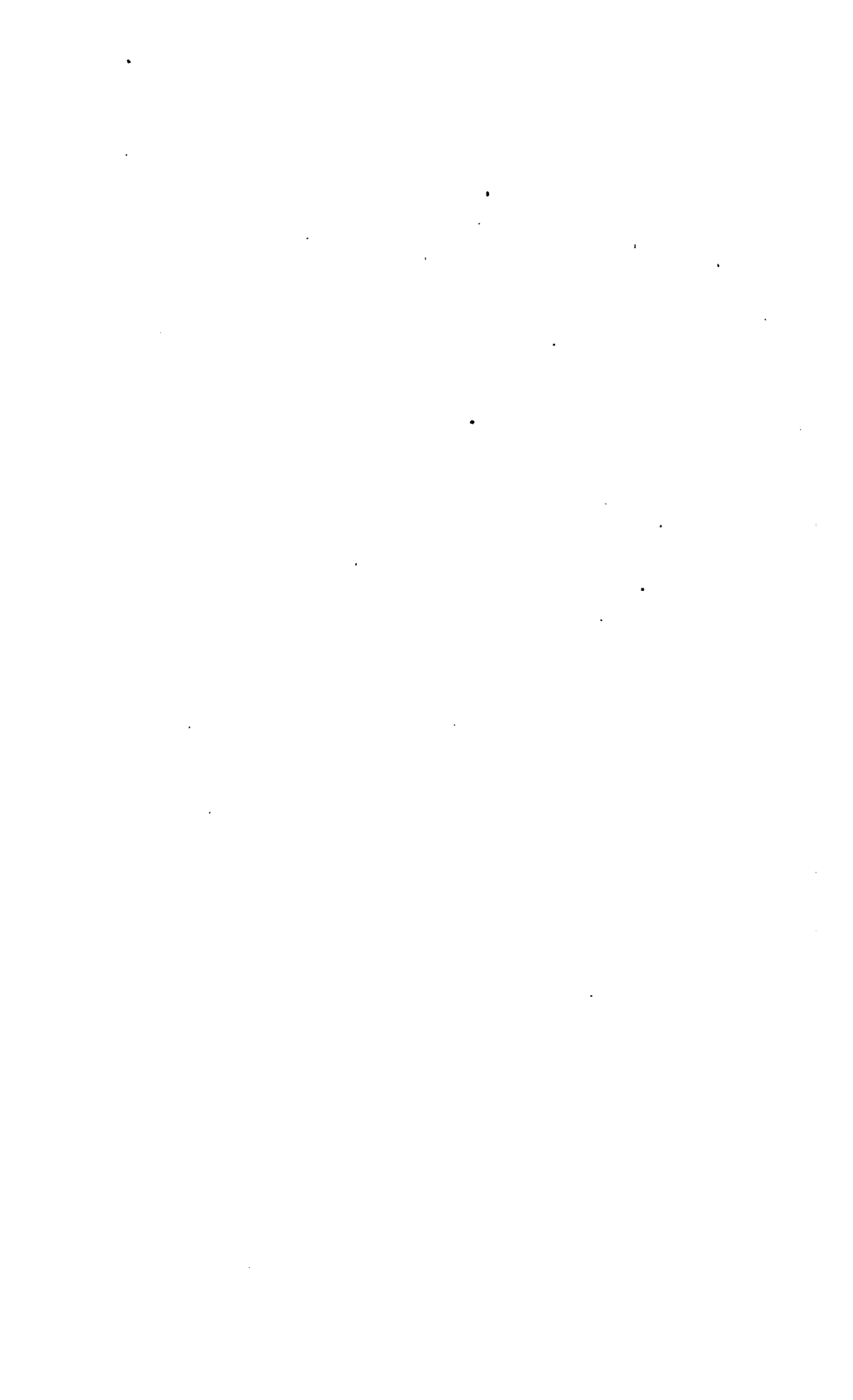
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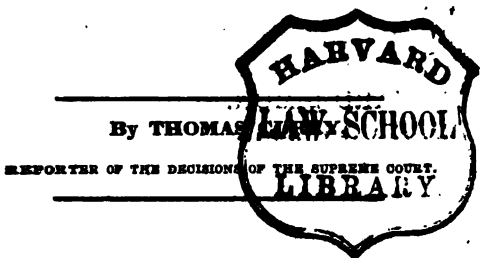
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REPORTS
OF
CASES ARGUED AND DETERMINED
IN
THE SUPREME COURT
OF
THE STATE OF LOUISIANA.



VOLUME XIX.



NEW ORLEANS.
PRINTED BY E. JOHNS & CO.,
CORNER OF ST. CHARLES AND COMMON STREETS.
1842.

JUDGES OF THE SUPREME COURT.

FRANÇOIS XAVIER MARTIN.
HENRY A. BULLARD.
ALONZO MORPHY.
EDWARD SIMON.
RICE GARLAND.

CHRISTIAN ROSELIUS, *Attorney General.*

**District, Parish, Probate and City Judges, from whose Judgments an
appeal lies to the Supreme Court.**

1st. Judicial District,	ALEXANDER M. BUCHANAN.
2d. " "	THOMAS C. NICHOLLS.
3d. " "	ISAAC JOHNSON.
4th. " "	H. F. DESLIEUX.
5th. " "	GEORGE R. KING.
6th. " "	HENRY BOYCE.
7th. " "	EPHRAIM K. WILSON.
8th. " "	JESSE R. JONES.
9th. " "	THOMAS CURRY.
10th. " "	JAMES G. CAMPBELL.

Commercial Court of New Orleans.

CHARLES WATTS.

Parish Court for the City and Parish of New Orleans.

CHARLES MAUMAN.

Probate Court for the City and Parish of New Orleans.

JOACHIM BERMUDEZ.

City Court of New Orleans.

THOMAS J. COOLY, Senior Presiding Judge.

LEWIS DUVIGNAUD, Junior " "

Special District Judges.

THOMAS BUTLER, 3d. Judicial District.

ALLEN PEIRSE, 9th. " "

JOHN B. CARR, 10th. " "

RULE OF COURT.

SUPREME COURT—DECEMBER 21st, 1841.

ORDERED, that in conformity with article 756 of the Code of Practice, the clerk of this court keep a separate docket of the causes which are to be *tried summarily*, which cases are those of application and trial of mandamus, writs of prohibition, certiorari, quo warranto, orders of arrest and discharge therefrom; dissolving and setting aside writs of attachment, or sustaining them improperly; setting aside or annulling writs of sequestration or provisional seizure, whenever an appeal will lie from an interlocutory judgment rendered; dissolutions of injunctions on the allegations in the petition; also in cases of injunctions; or opposition in cases when no security is required to be given by law. The nomination or appointment of tutors or curators of minors, of persons absent or interdicted; of vacant successions; of attorneys for absent heirs, and the syndics of creditors, when the court orders they shall administer provisionally. Motions to homologate the reports of experts, accounts of auditors, awards of arbitrators, nomination of syndics by creditors in cases of cession of goods; or successions, where creditors are authorized to appoint administrators or syndics; disputes relating to the privileges of creditors of a bankrupt, and the order in which they are to be paid; also all orders or judgments requiring syndics of creditors or the curators or administrators of successions to exhibit their bank books or accounts.

Motions against attorneys at law, sheriffs, coroners or other public officers, to recover from them money received in their official capacities, whenever the law allows a summary mode of proceeding; and all cases against attorneys at law, to deprive them of their license; and against clerks of courts accused of offences, that are to be tried by this court. Cases arising under the 13th section of the act of March 20, 1839, entitled "an act to amend the Code of Practice," and the act extending the provisions of the same.

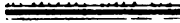
Cases arising under the act of March 28, 1840, entitled, "an act to abolish imprisonment for debt."

Judgments rendered on exceptions to the jurisdiction of a court, when the exception shall be or has been sustained. All cases in which the appellee or appellant is or shall be in actual custody.

The cases placed on this docket, will be set for Tuesday in each week, unless the court shall otherwise order. The promissory note docket will be called as usual; but whenever the cases on it are called through, and not a sufficient number are found for Monday, the cases on the summary docket will be called and set for that day and the one succeeding.

No question arising in a case on this docket will be examined or decided, other than those specified, unless it shall be so closely connected with the specified question or point, as to make it necessary to decide it, to enable the court to do justice on the points properly before it: and no case shall be placed on this docket, in which the points or cases specified herein are merely incidental to other questions arising in the case.

Whenever the clerk of the court is in doubt as to the docket on which he shall place a cause, he shall submit it to one of the judges for his opinion.



Many of the western cases, decided at Alexandria, at the October term, 1841, have been excluded for want of room. The most important and leading cases, however, appear in the close of the present volume. The remainder of the western cases are at the disposition of my successor, and will, it is presumed, be placed in the beginning of the next volume.

TO THE BENCH AND BAR OF LOUISIANA.

This volume of Reports completes the last of the series, which the present Reporter will publish. He tenders to the Judges of the Supreme Court and to the Bar of Louisiana, his grateful acknowledgments for the kind assistance and encouragement received from the Bench, and the liberal indulgence and patronage of the Bar during the progress of his labors. It has been his constant aim to prepare and record the Decisions and determinations of the Supreme Judicial Tribunal of the State, in the manner most useful and satisfactory to the profession. How far he has succeeded, is for the legal public to judge. Sensible of the many defects and errors incident to the business of Reporting, and the difficulty of performing the task with fidelity and correctness, he submits the past and concluding volumes with diffidence to the profession.

In closing his labors in this office, he offers his most cordial wishes and ardent desires that the profession of the law may be studied thoroughly and profoundly, and *practiced* with assiduity, urbanity and the highest sense of honor and honesty, by all its votaries and members; and that the duties of every judicial station be discharged with unflinching integrity, justice and independence, while the judgments of our courts proclaim the justice of each case, and the supreme law of the land.

New-Orleans, March 22, 1842.

CHRONOLOGICAL

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REPORTS
 OF
CASES ARGUED AND DETERMINED
 IN
THE SUPREME COURT
 OF
THE STATE OF LOUISIANA.

EASTERN DISTRICT.
NEW-ORLEANS, JUNE TERM, 1841.

AGRICULTURAL BANK OF MISSISSIPPI vs. BARQUE
JANE—GREGORY BYRNE, Owner.

19L	2
48	1530

APPEAL FROM THE COMMERCIAL COURT OF NEW ORLEANS.

The freighters of a vessel under charter party have no claim on the owner for damages alleged to have been occasioned by the accidents, &c., of the voyage. There is no privity between the freighters who contract with the charterer, and the owner.

The payment of privileged claims against a vessel, does not subrogate the persons paying, as privileged creditors, when there is no conventional subrogation.

The master of a vessel even under charter party, is bound to consult the owner in the home port, when necessary or extensive repairs are to be made.

When there is no privity of contract between plaintiff and defendant, the latter cannot be put in delay.

EASTERN DIS.
June, 1841.

**AGRICULTURAL
 BANK OF
 MISSISSIPPI
 vs.**

**BARQUE JANE,
 GREGORY
 BYRNE,
 OWNER.**

EASTERN DIS.
June, 1841.

AGRICULTURAL
BANK OF
MISSISSIPPI

vs.
BARQUE JANE,
GREGORY
BYRNE,
OWNER.

Proposals for a compromise or conversations about it, are not generally admissible in evidence; but if any fact or distinct liability is admitted, evidence of it may be given; allowing the party the benefit of *all the* conversations or propositions which took place.

The plaintiffs sue as the freighters of the Barque Jane, belonging to the defendant, to recover a large sum which they allege they have laid out and expended on said vessel, after shipping on board of her 1100 bales of cotton, in consequence of her unseaworthiness at the time of shipment. They further show that the defendant had chartered said vessel on the 4th December, 1837, to one N. S. Smith, to proceed on a voyage from the port of New-Orleans or Natchez, to Liverpool, or a port in France, and back again; and that he guarantied to make her sea-worthy and ready for sea. That Smith took command and brought said vessel to Natchez, where they freighted her with cotton, and that on going to sea, she proved wholly unseaworthy; so much so that she was compelled to put back, discharge her cargo and undergo extensive repairs at their cost; and on refitting, proceeded on the voyage under a new captain. They allege that the defendant and vessel are liable for all the repairs and expenses in the refitting and reshipment, on his guaranty. That they are subrogated to the rights of N. S. Smith under his charter party by operation of law and the agreement therein so as to make the guaranty of said defendant enure to their benefit. They pray judgment for \$12,401 65, with a privilege on the vessel for the sum of \$6,917 39.

The defendant pleaded first the general issue, and set up special matters in defence. He also reconvened in the sum of \$1,567 44, for balance due on the charter party.

The pleadings, issues, facts and evidence of the whole case are so fully set forth in the written opinion of this court, that they need not be recapitulated.

The cause was submitted to a jury, on the pleadings and evidence adduced, under a charge from the judge. The jury were instructed that there was an implied contract that every vessel employed or chartered to carry freight, was sea-worthy;

and if she was not, that the owner is liable for any damage arising in consequence thereof, &c. EASTERN DIS.
June, 1841.

The main inquiry was, then, as to the sea-worthiness of the vessel? The plaintiffs proved they had made extensive repairs, in consequence of which the vessel was better and of more value than at first.

AGRICULTURAL
BANK OF
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GREGORY
BYRNE,
OWNER.

When the cause was about to go to the jury, the plaintiffs dismissed so much of their action as claims for average; and continue it only for the amount of repairs, the ship's contribution to general average and insurance on the vessel, amounting to \$6,917 80. There was a verdict and judgment in favor of the plaintiffs for \$5,349. The defendant appealed.

Lockett & Micou, for the plaintiffs.

Grymes, for the defendant.

Garland, J. delivered the opinion of the court.

The plaintiffs allege that the Barque Jane was, in December, 1837, chartered by her owner, Byrne, to N. S. Smith, for a voyage from Natchez or New-Orleans to Liverpool, or a port in France, and back again. That the Barque was warranted to be made sea-worthy, to stand A. 3 at the insurance offices, and in the charter party it is agreed, the price shall be four thousand four hundred dollars, \$2,832 56, paid in cash, and the remainder at the expiration of the voyage. Smith was to pay all the port charges, the victualling and manning of the ship, and all and every expense attendant upon the voyage, which shall not amount to a case of average. He received the vessel in New-Orleans, went to Natchez, where he took on freight for plaintiffs upwards of eleven hundred bales of cotton, and the vessel departed on her voyage to Liverpool. It is alleged that soon after leaving the mouth of the Mississippi, without any disaster, accident or recent apparent cause, the vessel sprung a-leak and was compelled to return to New-Orleans for repairs and prevent a total loss, where a survey was

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June, 1841.

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OWNER.**

had by the port wardens and other legal officers, when the cargo was ordered to be discharged, the vessel pronounced unseaworthy, but capable of being repaired, so as to complete the voyage. That Smith being unable to repair the vessel, placed her under the control of the plaintiffs on condition, that they should loan and advance to the said captain and charterer the sums necessary for said voyage, that in pursuance of this agreement, the plaintiffs lent and advanced said Smith money to pay the wages of the captain and crew, for supplies, labor, repairs, armament and equipment of the vessel, premiums of insurance, damage done to freighters, and such other expenses and repairs as the owners were liable to pay in the nature of a partial average. It is further alleged, that in pursuance of this agreement, the plaintiffs appointed another captain to command the vessel, fitted her out and sent her to her port of destination, thereby enabling her to earn her freight. They further say the vessel remained pledged during the continuance of the voyage, and that their advances amount to \$6,917 37. It is also alleged that when the vessel first went to sea she was not sea-worthy, wherefore the plaintiffs say, Byrne has violated his warranty and thereby became personally liable for the amount claimed. There is also an allegation of being subrogated to the rights of Smith by operation of law and the agreement aforesaid, so far as to make the warranty of the defendant enure to the plaintiffs' benefit. The Barque was sequestered and a judgment prayed for, condemning her to be sold.

The defendant denied plaintiffs' right to sue, and craved oyer of their charter. After a general denial he specially answered :

1. That supposing the plaintiffs' statements to be true, yet he is in no manner bound to them as he has never contracted with them.
2. The plaintiffs have no lien on the Barque.
3. They have no right of action as the money said to have been advanced was not on his (defendant's) account, or at his

request, but for the sole use and benefit of the plaintiffs or some other person with whom they had contracted.

4. That at the time of the alleged advances, the Barque was not in the possession of defendant, but in possession of Smith, the charterer, who was for the voyage the owner and possessor thereof, and is alone responsible.

5. That the money alleged to have been advanced, was disbursed not for his use but against his express consent, he being at all times ready and willing to comply with his charter party, according to law and mercantile usage.

The defendant further pleads in re-convention the sum of \$1,567 44, the balance due on the charter party.

The evidence shows the Barque left Natchez and reached New-Orleans in February, 1838, which port she left on the 19th of the same month, when, as Smith the master, and the mate, say in their protest, made on oath, "that at the time of sailing, the said Barque was tight and staunch, well manned and provided." They proceed to say they were towed to the mouth of the river; the next day in endeavoring to get out, the steamer ran aground in the South-West Pass, and the ship ran foul of her, "which carried away the shank of the anchor, drove the flukes through the sheathing and the stock into the bows about a foot," the vessel also grounded, but soon got off. She was taken to the pilots' establishment, a survey was had, the damages repaired, and she again put to sea, the pumps having been frequently used, and the vessel making no unusual quantity of water. They left the Mississippi the second time, on the 27th of February, when there was no leak; in going out she again grounded on the bar, and was taken off by a steamer. On the night of the 1st of March, the weather becoming quite severe and the sea rough, the Barque commenced leaking. The gale increased during the night, and the vessel leaked so much, as to compel the master to put back, the crew refusing to do duty, unless he did so. The vessel returned to the passes, discharged a part of the cargo to lighten her over the bar, and was towed to the city, where she

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June, 1841.

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OWNER.

EASTERN DIS. was examined, and pronounced by most of the witnesses un-
June, 1841. sea-worthy, although there is one who says he supposes the
AGRICULTURAL vessel sea-worthy in the month of December, 1837, and was
BANK OF so, at the time of sailing. On the 15th of March, the char-
MISSISSIPPI terer and master made a note of protest before a notary, com-
VS. menced discharging the cargo, and a few days after wrote a
BARQUE JANE, letter to Messrs. J. H. Leverich & Co., informing them of his
GREGORY having returned from sea in distress, his having seen the agent
BYRNE, of the consignees in Liverpool, that it was necessary to dis-
OWNER. charge the cargo to have a survey, and he concludes by say-
 ing he has the consent of that agent to appoint Leverich & Co.
 agent for himself and all concerned.

There is no evidence to show that on the return of the vessel
 to New-Orleans where the defendant resides, he was informed
 of it, nor was he called upon to attend the survey or repair the
 vessel. Smith in his protest, says, whilst at the South-West
 Pass, he received two messages from the defendant, one of
 which was to act as he thought proper, and the other stating
 he had nothing to do with the Barque, but requesting the mas-
 ter to proceed as he thought best. Whether the master had
 sent him any message does not appear. Not a single witness
 speaks of any demand being made on the defendant to repair
 the vessel, although he is a ship-builder, and has an extensive
 establishment for the purpose of building and repairing ves-
 sels, nor was he called on to furnish another vessel to take the
 cargo from the Jane.

Mr. Leverich testifies, that after the Barque returned in dis-
 tress, Smith insisted upon taking a part of the cargo to pay
 for the repairs, he would not give up the cotton, and it was
 only allowed to go under the control of witness upon condition
 of his paying for all the repairs of the vessel, the defendant
 having the privilege of appointing another captain in case the
 insurance offices should refuse to take risks upon the cargo on
 account of the captain, which it appears they did, and a new
 captain was appointed, the vessel and cargo consigned to wit-
 ness's friends in Liverpool, and to his own house on her

homeward voyage. The new consignees in Liverpool received the freight on the outward cargo and the witness on that inward. It further appears from the testimony of this witness, that in consequence of an increase in the rate of freight from the time the Barque sailed from Natchez to the time of her return in distress, it would have cost the plaintiffs five or six thousand dollars more to have shipped their cotton by another vessel.

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It further appears, that Smith continued to superintend the repairs of the vessel up to the time of her final departure; as nearly all the accounts paid by Leverich are approved by him, he was in the same city with the defendant more than three months, and never said a word to him about repairing the vessel or paying the expenses, nor do the plaintiffs appear to have called on him until long after the vessel had sailed, and finally, it appears, that about two months and a half after the vessel had returned, had been condemned as unseaworthy, was supposed to have been so for months previous, and was then undergoing repairs. Smith, the charterer and master, and his mate, by a notarial protest on oath, say, the excessive violence of the elements as before recited, was the cause of all the loss and damage sustained by the Barque, and this protest is offered in evidence by the plaintiffs themselves, and they, by repeatedly endeavoring to effect an insurance on the cargo, seemed willing to guaranty the sea-worthiness of the vessel, and did at last warrant it, by obtaining an insurance and receiving indemnity for the loss sustained by the leaking of the Barque.

The plaintiffs base their hopes of recovery on several grounds.

First: The vessel was unseaworthy when the cargo was taken on board, and she first sailed; that Byrne had warranted her to be sea-worthy, and that she should stand A. 3, at the insurance offices. The counsel have read us various authorities to prove it is an indispensable obligation of every owner when he offers a vessel for freight or charter to furnish

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one that is staunch and tight. This is no doubt true, and Smith, to whom the Jane was chartered, in his protest made in May, 1838, uses the words of the law in which he is sustained by the mate. This declaration was made after both of them had a full opportunity of examining the vessel.

We are unable to see the grounds of the plaintiffs' claim to the benefit of the warranty made in favor of Smith. That we

The freight-
ers of a vessel
under charter
party have no
claim on the
owner for dam-
ages alleged to
have been oc-
casioned by the
accidents, &c.,
of the voyage.
There is no
privity between
the freighters
who contract
with the char-
terer, and the
owner.

suppose, is as much personal to him as any other contract, and as there is no privity between the plaintiffs and the defendant and they have no assignment of his (Smith's,) rights, we do not think they can recover on that ground. Smith engaged to furnish plaintiffs a good ship, and he is the person responsible for a failure to do so. When they call on him for damages for a breach of his contract, it is possible he may have a right to call the defendant to defend him, but until then, the plaintiffs have no right to assume Smith's rights and use them for their benefit.

The letter to Leverich & Co. from Smith, is no assignment of those rights, but only constitutes that firm the agents of himself and all concerned, without mentioning the names or interests of the plaintiffs or the defendant, and when he was finally compelled to give up the command of the vessel, he does not seem to have abandoned his right to receive the freight on the outward and inward cargoes, or any other to which he was entitled.

They next say, they are subrogated to the rights of Smith. It is not pretended there is a conventional subrogation; it must therefore be legal, if there be any.

We have examined the provisions of our law that regulate legal subrogations and cannot find any that will cover this case. The plaintiffs do not come within any of the clauses of the art. 2157 of the Code, or any adjudged case; and the counsel has not referred us to any principle in the maritime law, which supports his position. If the counsel means that his clients are subrogated to the claims of the ship-carpenters

and other workmen and the vendors of supplies and materials, we think he is equally unfortunate. Those persons very probably had privileges for their labor, supplies and materials, but when the agents of the plaintiffs paid them, they took no conventional subrogation of their rights and they do not stand in a position to have them transferred by operation of law.

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BYRNE,
OWNER.

The third ground taken by the plaintiffs is, that as the vessel was in the possession of Smith, he had a right to have her repaired and was not bound to call on the owner. If Smith had have been the master employed by the owner and not in the home port this would probably be true. The master of a vessel in a distant or foreign port, has the power to raise money to make necessary repairs and purchase supplies, and for that purpose, may bind the owner personally or hypothecate the vessel. This is a well established principle of maritime law and is founded upon another well known principle that the master is the agent of the owner and has sometimes to act under circumstances that will not allow of such delay that he may be consulted. But when in a port not so distant as that injury will result from a short delay, a prudent master will, and ought always to consult with his owner, before contracting to have expensive repairs made on a vessel at his cost, and when in the home port, we think he is bound to notify and consult him. The character of the agency of the master is much restricted when in the same place with his employer, and it would be allowing an agent an almost unlimited control over the property of his principal, if he could at his will and pleasure incur large or extravagant expenditures without consultation or notice.

The payment of privileged claims against a vessel, does not subrogate the persons paying, as privileged creditors, when there is no conventional subrogation.

The master of a vessel even under charter party, is bound to consult the owner in the home port, when necessary or extensive repairs are to be made.

But this case is not as strong as that of an ordinary master either in the home or a distant port. Smith was the charterer of the barque, and there is no evidence to show that Byrne knew he was to be the master, and it would be going very far to say that one party to a charter-party by taking on himself the quality of master, can bind the other to an indefinite extent, without his consent. We are not prepared to sanction such

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an application of a well understood and necessary rule. We think the master of a vessel ought on all convenient occasions to inform and consult with his owner, when any extraordinary expenses are to be incurred, or any deviation from the ordinary rules of business is about to be made. There is no evidence of any such ratification or consultation in this case, and we think this ground is not more tenable than the others.

It has been strongly urged by the defendant's counsel that the plaintiff cannot recover in this case, because the defendant has not been put legally in default according to the article 1905 of the Code. If this suit had have been brought by Smith for damages for a breach of the contract, or to coerce a specific performance, it is very probable it would have been necessary to put the party in default, and if we held the plaintiffs were the assignees of Smith, they would come under the same obligation. But as there is no contract between plaintiffs and defendant he cannot be put in delay.

When there is no privity of contract between plaintiff and defendant, the latter cannot be put in delay.

Upon a full examination of all the circumstances of this case, we do not see but one ground upon which the plaintiffs can hope to recover, and that is, as Byrne was residing very near to the place where the vessel was repaired, he is presumed to know what was doing to her, and as he did not object to the repairs being made or offer to do them himself, he ought to pay for them. This rests upon the equitable principle that one man ought not to enrich himself at the expense of another. In considering it, the motive that induced the plaintiffs to undertake the repairs to the Jane ought to be taken into consideration. The equities on both sides should be weighed. There is no doubt a considerable sum of money was expended by plaintiffs on a vessel belonging to defendant, by which her value was much increased, but the evidence leaves it doubtful whether he knew any thing about it. On the other hand, the plaintiffs did not act entirely from disinterested motives in making the expenditures and advances they did. Their own witness says they profited five or six thousand dollars by the outlay, in consequence of the increase in the rate of freight.

We do not think the verdict fully sustained by the evidence nor do we think substantial justice has been done between the parties; we must therefore remand the case for a new trial.

The plaintiffs have directed our attention to a bill of exception taken by them to the opinion of the court excluding a letter from defendant addressed to J. H. Leverich, Esq., on the 19th of October, 1838. The ground on which the letter was rejected was, it was a proposal for a compromise, in compliance with a request from Leverich. If the letter contained nothing more than proposals for a compromise we should say the judge did not err in rejecting it, but we think it makes an admission of a fact, to establish which it was proper evidence. It says "I am willing either to sell the ship at a low price or charter her, *so as to pay what I may be indebted to the bank*; in no case, however, shall I agree to pay all the bills," &c. He also says, he is willing to pay the sum for which he could have repaired the vessel in his own yard, which is about three thousand dollars.

The rule of evidence is, that mere proposals for a compromise or the conversations or negotiations which may take place for the purpose of effecting one, are not generally admissible as evidence, but if in the proposals, conversations or negotiations any fact or distinct liability is admitted, evidence may be given of that, but the party who is attempted to be charged in this manner, is entitled to have the benefit of all the conversation or proposal, and the whole should be considered by the court and jury; 2 Starkie, 38; 2 Martin's Rep., 175; 4 Pickering, 377. If a claim be set up against an individual and he say, I do not owe it, but rather than have a suit or further difficulty I will give or pay a certain sum, this should not be admitted; but if on the presentation of an account certain items are admitted and others denied, this may be given in evidence; so if we have a demand against another and in endeavoring to settle it, the person charged admits the indebtedness but denies the extent of it, the whole may be admitted

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Proposals for a compromise or conversations about it, are not generally admissible in evidence; but if any fact or distinct liability is admitted, evidence of it may be given; allowing the party the benefit of all the conversations or propositions which took place.

EASTERN DIS. as evidence. We therefore think the judge erred in rejecting
June, 1841. the letter of the defendant.

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CHAMPLIN.**

The judgment of the Commercial Court is therefore annulled, avoided and reversed, and the case is remanded to that court to be proceeded in according to law, with directions not to reject the letter of the defendant of the 19th of December, 1838, the plaintiffs to pay the costs of this appeal.

CROCKER, Syndic, &c., vs. CHAMPLIN.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

An insolvent debtor may make valid sales of his property at any time before actual insolvency, when no preference is given to any creditor over others.

This is an action by the syndic of the creditors of one W. W. Stewart, an absconding and insolvent debtor, to set aside two sales of certain city lots and improvements thereon, made to the defendant with a knowledge of the vendor's insolvency, and to recover back said property for the benefit of the creditors.

The defendant pleaded the general issue, and denied specially every allegation in the petition.

The acts of sale showed that the defendant purchased said property for a fair price, and assumed certain sums or debts owing on it by the insolvent, and gave his notes with mortgage for the balance.

The sales were made in months of May and June, 1838, and on the 30th July following, the insolvent applied for the benefit of the insolvent law, in relation to debtors in actual custody. He was imprisoned for a small debt of about \$100, due to Champlin & Cooper.

The judge *a quo* was of opinion, that the sales in question

were for a *bona fide* consideration paid and delivered at the time. There was judgment for the defendant, and the plaintiff appealed.

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CROCKER,
SYNDIC, &C.,
VS.
CHAMPLIN.

Elwyn, for the plaintiff.

McKinney, contra.

Martin, J. delivered the opinion of the court.

The syndic is appellant from a judgment in favor of the defendant, in which the former sought to set aside two acts of sale, executed by the insolvent to the defendant, of real property, on the ground that said sales were made within three months preceding the failure of the vendor.

It does not appear to us that the court erred. The sales in question were indeed made within the above period, but nothing shows that *any preference* was given or intended to be given to any creditor over others. The deeds of sale show, that the defendant assumed to pay in each case, a sum which remained due on the property from his vendor; and gave his own notes for the balance, bearing mortgage on the premises.

An insolvent debtor may make valid sales of his property at any time before actual insolvency, when no preference is given to any creditor over others.

It is in evidence, that the defendant paid a part of what was due by *his* vendor on this property, and also of his own notes, in due time; and nothing shows that any part of the balance is still due. No part of the insolvent's property was removed from the reach of the mass of the creditors, except the real property purchased by the defendant. If any portion of the price he engaged to pay, yet remains due and unpaid, the whole of the premises is bound for the payment of it. There is no allegation or evidence of unfairness in the price, and there does not appear to be any ground for the rescission of the sale.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

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NOTT & CO. vs. KIRKMAN ET AL.

APPEAL FROM THE COMMERCIAL COURT OF NEW ORLEANS.

NOTT & CO.

vs.
KIRKMAN ET
AL.

The verdict of the jury in a case presenting only facts will not be disturbed when not manifestly erroneous.

This is an action to recover damages from the defendants on the alledged ground of having sold to the plaintiffs a large lot of cotton, being upwards of one thousand bales, as good sound merchantable cotton, for a full price, according to samples exhibited; when in fact more than one hundred bales were not of the quality represented, but had been falsely packed, and plated on the outside with good cotton. That in consequence of said fraud these bales were returned to the plaintiffs, after being shipped to Liverpool, to their great damage, \$2000, for which they pray judgment.

The defendants pleaded the general issue and averred they sold the cotton as factors and agents, and that the plaintiffs examined and bought with full knowledge of the various qualities composing said lot, and they are not liable in the premises.

On these issues the cause was submitted to a jury, who, upon the facts disclosed by the evidence as detailed in the opinion of this court, returned a verdict for the defendants. The plaintiffs appealed.

Strawbridge, for the plaintiffs and appellants.

F. B. Conrad, contra.

Simon, J. delivered the opinion of the court.

Plaintiffs represent that on the 14th of June, 1836, they purchased from the defendants, a large lot of cotton, upwards of one thousand bales, for which they paid them the price of sound and good cotton, conforming to the samples by which they were sold, that upwards of one hundred bales were not of the quality represented, but had been *falsely packed*, being plated on the outside with good cotton, whilst the interior was

inferior, being stained and damaged, and so much so that it was returned to them, and that they were obliged to refund the price thereof with damages. They pray for judgment for \$2000.

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The defendants pleaded the general issue, and further averred that plaintiffs received the cotton by them purchased of the respondents as the agents and factors of sundry persons in the State of Alabama, which fact was known to the plaintiffs, and that therefore they are not liable in the premises. The jury found a verdict in favor of the defendants, and after an unsuccessful attempt to obtain a new trial, the plaintiffs appealed.

The testimony of one Schmidt, who was examined on the part of the plaintiffs, shows that one thousand and eighty-one bales of Alabama cotton were sold by the defendants to said plaintiffs; that this sale took place on the 14th of June, 1836; that Alabama cotton had for the last several years been of a very inferior quality; that the whole of the lot was sold at an average price of 13½ cents; that some were estimated as high as 17½ cents, and others as low as 11½ cents.

A. Longer, another of plaintiffs witnesses, confirms the statement made by Schmidt, and adds that he examined the marks put upon the cotton, and knows the shipping marks to be correctly stated in the lists; that some of the Alabama cotton that year was very fine and some of a *mixed quality*; that he examined the cotton himself, and generally went through some three or four samples in a bale; that it depends on how the cotton is packed; that he saw no mark of false packing, and thinks, if there had been any, he would have seen it; that this was, as he supposes, all Alabama cotton; that the defendants were the factors of said cotton, and witness bought it of them, acting as plaintiffs' broker. He further says that he went through the cotton and sampled every bale and classed it. He does not recollect having taken different samples from one bale, but knows that the Alabama cotton is in general, when sampled, of several different qualities. If he had discovered a bale having good cotton outside and indifferent cotton

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inside he would have rejected it as having been falsely packed, but he did not discover any fraudulent packing from his examination.

Several witnesses were examined in Liverpool by virtue of a commission; one of whom, Hardman Earle, testifies that as surveyor he examined the cotton, and found ninety-nine bales unmerchantable, being *falsely packed*; that he examined the interior of each bale, and that the bad or inferior cotton varied very much in the different bales. One of the other witnesses agrees with Earle that the cotton in question was not sea damaged, that it was falsely packed, and that the bales which he examined was composed of *various qualities* of cotton; all the other witnesses also testify that the cotton was not sea damaged, and was falsely packed; but they all say that they did not examine the interior of the bales; and in general, though they all agree in considering those bales as having been falsely packed, none of them swears that any of the bales was plated outside with good cotton. It is also shown that the whole lot was originally sold in Liverpool at ten pence per pound, but that out of the one hundred and one bales which were returned, *fourteen* were sold at eight pence; *sixty-three* bales at eight five eighths pence; *twelve* at eight pence and half penny; *eleven* at eight pence three fourths; and *one* bale at seven pence.

From this evidence it appears to us clear that the lot of cotton purchased by the plaintiffs here, and composed of one thousand and eighty-one bales, was, within the knowledge of the plaintiffs, of *mixed* and *different qualities* at the time of the purchase; and that among those qualities, there were some superior, and others very inferior, since they averaged $13\frac{1}{2}$ cents, when the prices varied from $11\frac{1}{2}$ cents to $17\frac{1}{2}$ cents; this difference in the prices is satisfactorily explained by the witnesses, and it is not astonishing that under such circumstances, on a lot of one thousand and eighty-one bales, one hundred and one should have been found at Liverpool to be so inferior as to lose two pence on the general price; and it seems even rather

surprising from the average price paid here, that nine hundred and eighty bales should have been found in Liverpool of such quality as to command the same price. The difference between eight and ten pence, is not greater than between $11\frac{1}{2}$ and $17\frac{1}{2}$ cts, and nothing shows that ten pence was not the highest price of the market at the time the cotton was sold. It is true the witnesses examined in England all say that the one hundred and one bales were *falsely packed*, but in the meantime, they qualify the meaning of these expressions, by saying that the rejected bales, on being opened, were found to contain cotton of mixed and inferior qualities. This, it seems to us, the plaintiffs were aware of when they purchased; they cannot now complain of it, since they themselves have shown the condition in which said cotton was at the time of the purchase, to wit: of different prices and qualities, and surely they could not pretend that the whole lot should have commanded an equal and uniform price in the Liverpool market.

We think that, under the circumstances of the case, the verdict of the jury, on the only question of fact which this case presents, if in any manner erroneous, is not so manifestly so, as to require our interference.

It is therefore ordered, adjudged and decreed that the judgment of the Commercial Court be affirmed with costs.

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AL.

The verdict of the jury in a case presenting only facts will not be disturbed when not manifestly erroneous.

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NOTT & Co. vs. OAKLEY ET AL.

APPEAL FROM THE COMMERCIAL COURT OF NEW ORLEANS.

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Where the terms of an auction sale are changed, or new conditions imposed, from those advertised, by proclaiming them at the stand at the commencement of the sale, the purchaser is not bound by them, and a re-sale cannot be made at his risk.

A purchaser at the first sale, declining to comply with a new condition, not published in the auction bills, but proclaimed at the stand by the auctioneer, is at liberty to bid and become a purchaser at the second sale, without regard to his first bid.

This is an action on the *folle enchère*, to recover the difference between the first and second bids, made by the defendants on 300 shares of Gas Light Bank Stock.

In obedience to an order of the probate court of New Orleans, made in the succession of Wm. Nott, deceased, the Register of Wills advertised sundry bank stocks for sale. The terms published in the auction bills were "*six months credit for approved endorsed notes, or payment will be received in debts due by the succession, or by the firm of Nott & Co.*"

The defendants bid off and became the purchasers of 300 shares of the stock of the Gas Light Bank, at \$25 50. After the sale they were told, one of the conditions was, that the purchaser should assume a stock note of \$15 per share in part payment of the purchase. The defendants objected and disregarded this new condition, as it was not published in the advertisements or auction bills; but said they were ready to comply by paying in claims due by the estate.

On the refusal of defendants, a re-sale was made at their risk, and they became the purchasers again, through R. Curell, their agent, at \$20 50 per share on the new terms, which were duly advertised.

The plaintiffs allege, they have lost \$1614 67 on the difference between the first and second sales, for which the defendants are liable.

The Register of Wills, who made the sales, testified that when the sale was about to commence, he proclaimed from the

stand in an audible voice, that the purchasers of bank stock would be required to assume the stock notes, in payment of the stocks purchased by them. This condition being different from those contained in the handbills distributed at the first sale, the defendants disregarded it.

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There was judgment for the defendants, and the plaintiffs appealed.

Strawbridge, for the plaintiffs.

L. Peirce, for the defendants.

Morphy, J., delivered the opinion of the court.

The plaintiffs seek to recover the difference between the price at which three hundred shares of the Gas Light Bank Stock were adjudicated to defendants; and that which they brought on a re-sale at public auction, on their refusal to carry into effect the first adjudication.

The record shows, that at a meeting of the creditors of the succession of Wm. Nott, and of the firm of Wm. Nott & Co., it was agreed between them, that this stock, together with divers stocks of other institutions, should be sold at a credit of six months, or payment to be made in debts due by the succession or the firm. The sale was accordingly ordered by the Court of Probates, and advertised agreeably to the deliberation of the creditors. On the day of sale, hand bills were distributed around the stand of the auctioneer, containing the same conditions in relation to the mode of payment. It appears, that when about proceeding to the sale, the Register of Wills received from some one, whom he supposed authorized to act for the estate, an additional condition, not mentioned in the newspaper advertisements, or in the handbills, but which, he says, he proclaimed from his stand in a loud and audible voice. This condition was, that the purchasers should assume their respective portions of a stock note of fifteen dollars per share. The defendants refused to assume any part of the stock note for which the three hundred shares purchased by them were

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pledged, alleging that they knew nothing about this new condition, but they declared their readiness to pay in claims against the plaintiffs of whom they were creditors. Upon this refusal, the stock was again set up for sale, at the risk and for the account of defendants; but at this second sale, the new condition was duly advertised, and the defendants, through an agent, became purchasers of this same stock at a price inferior to that of the former adjudication. Under these facts the judge below was of opinion, that the defendants could not be made liable for the difference between the two sales and the costs incurred. We fully coincide in this opinion. If the defendants purchased this stock above its market price, when it was in no demand, as the witnesses testify, it is reasonable to suppose,

Where the terms of an auction sale are changed, or new conditions imposed, from those advertised, by proclaiming them at the stand at the commencement of the sale, the purchaser is not bound by them, and a re-sale cannot be made at his risk.

that they were induced to do so on account of the facility held out to them by the advertisements, as to the mode of payment. Amidst the bustle and noise generally attending auction sales at the St. Louis Coffee house, a new condition announced by the auctioneer may not have been heard or properly understood. The purchase may have been made under an error created by the plaintiffs themselves, by whose direction, we must suppose, the handbills were distributed among the purchasers. The latter, engaged probably in reading them, paid but little attention to the formal announcement of the conditions by the auctioneer, which they might well have supposed to be but a repetition of those they had before them. This new condition, besides, appears in some manner to have been unauthorized. No mention of it is to be found in the *procès-verbal* of the deliberations of the creditors, or in the petition and order for the sale. It does not seem either to have been well understood by the auctioneer himself; for *Curell* who bought this stock for defendants, testifies that having indirectly heard something said about there being stock notes on it, he put the question to the auctioneer, whether it was obligatory to assume any stock notes, to which the latter replied, that he presumed it would be optional with the purchasers to do it or not. This must have led defendants' agent to suppose, that there was no absolute

change in the printed conditions, and that they would govern, if insisted on by the purchasers. This witness tells us, that under this impression he bought for the defendants the three hundred shares in question; that defendants would never have thought of purchasing them, if bound to pay any money; but that having engagements under protest of Wm. Nott & Co., they were desirous of liquidating the debt as proposed in the advertisements.

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It is said, that under article 2590 of the Louisiana Code, the first purchaser cannot be allowed to bid at a second crying, either directly, or through the intervention of another person; and that defendants, by purchasing at the second sale, have ratified the first.

A purchaser at the first sale, declining to comply with a new condition, not published in the auction bills, but proclaimed at the stand by the auctioneer, is at liberty to bid, and become a purchaser at the second sale, without regard to his first bid.

To this, it has been satisfactorily answered, that if defendants were not bound to execute the first adjudication under the circumstances attending it, the re-sale was not for their risk and on their account; and that moreover the conditions of the second sale being different and more onerous than those of the first, the defendants cannot be made liable for any difference in the price obtained; and had an equal right to purchase with any other person.

The judgment of the commercial court is therefore affirmed with costs.

CASES IN THE SUPREME COURT

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ORLEANS.

Purchasers at auction are not bound by new conditions, proclaimed verbally from the stand by the auctioneer, different from or more onerous than those advertised in the auction bills.

This is an action on the *folle enchère*, to recover the difference between two bids on three hundred and fifty shares of Gas Bank stock, adjudicated to the defendants. At the first sale they bid \$24 per share, but refused to comply with some new conditions imposed at the sale. It was resold at their risk and purchased by their agent for \$20 50. They are sought to be charged with the difference. This case is decided on the same principles and facts of the preceding one, between the same plaintiffs and Oakey et al.

Strawbridge for the plaintiffs.

L. Peirce for defendants.

Morphy, J. delivered the opinion of the court.

This case being similar in every respect to that this day decided between the same plaintiffs and S. W. Oakey & Co., must receive the same decision, on the grounds therein set forth.

The judgment of the Commercial Court is therefore affirmed with costs.

VIGNIE vs. SAULET.

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vs.
SAULET.

Where the construction of an agreement leaves it doubtful whether the agent was entitled to commissions on certain notes received in payment, or only on monies received, and the jury find a verdict in the affirmative, it will not be disturbed.

This is an action by an agent to recover certain commissions on monies and notes collected and received in payment, for his principal, in the absence of the latter under written agreement. The defendant agreed to give the plaintiff five per cent. commission on all his collections, but avers it was never intended that a commission should be charged on monies collected through bank, or on the amount of promissory notes received in payment of other debts. On this ground the defendant refused to allow the plaintiff's account for commissions.

The cause was submitted to a jury who returned a verdict for the plaintiff, and from judgment rendered thereon the defendant appealed.

Roselius, for the plaintiff.

Pichot, for defendant.

Morphy, J. delivered the opinion of the court.

The plaintiff claims as attorney in fact of defendant, \$2358 05, being a commission of five per cent. on \$47,160 26, the amount alleged to have been collected or received for account of defendant during his absence. This charge is predicated on a special contract, by which defendant agreed to allow his agent five per cent. on all sums which should be received; the expressions used in the agreement are "*Je suis convenu de donner à Mr. J. B. Vignié cinq pour cent sur toutes les rentrées.*" The defendant admits the agency of plaintiff and the agreement under which he claims, but he avers that it was never intended that a commission should be charged by his

EASTERN DIS.
June, 1841.

**VIGNIE,
 vs.
 SAULET.**

attorney in fact on monies collected for him by the bank. He objects also to any commission being charged on certain notes received in payment, part of which have been protested; and on certain monies paid over to plaintiff as his agent by Plauché; the same being for house rent and slaves' hire collected by the latter. In answer to certain interrogatories tending to show that plaintiff was guilty of a misrepresentation as to the rate of commission which he charged to others for similar services; plaintiff declared that when defendant applied to him to take charge of his affairs, he observed to defendant, that as his fortune was large and required great attention and labor on the part of his agent, he would not take the agency unless he would give him a commission of five per cent on all funds received during his absence, that defendant agreed to this without any inquiry as to the rate of commission charged to other persons; that this commission was stipulated in order to simplify the keeping of the accounts; both parties well knowing that various important services were to be rendered and have been rendered for which no commission or compensation is charged; and that moreover he charges the same rate of commission to all persons residing in France whose business he transacts as agent. The case was tried before a jury who gave plaintiff a verdict; after ineffectually attempting to set it aside, defendant appealed.

The only part of plaintiff's claim on which there is some doubt in our minds is that portion of the commission charged on two notes of F. W. Lea received by plaintiff in payment of a debt due to defendant by Lindor Saulet, on whose property it was secured by mortgage. In a sale made to Lea by the debtor, plaintiff intervened and received these notes. In the expression *rentrées* used in defendant's agreement, it is doubtful whether notes and monied obligations were intended to be included; the jury perhaps thought that a liberal construction should be given to this agreement when they considered that the written instructions left to his agent by defendant, and the account rendered by plaintiff amounting to \$114,615 42, show

numerous disbursements and other services for which no charge is made, and that a larger compensation might have been claimed, had there been no special contract and had the customary charges been made for all the services rendered, such as disbursements, compromises, sales effected, &c., the verdict is not so clearly erroneous as to make it our duty to disturb it.

It is therefore ordered that the judgment of the Parish Court be affirmed with costs.

*EASTMAN DIS.
June, 1841.*

*LEE & HARDY,
vs.*

PALMER ET AL.

LEE & HARDY vs. PALMER ET AL.

ON AN APPLICATION FOR A RE-HEARING.

The damages allowed by law to the appellee in case of a frivolous appeal, or one evidently taken for delay, will not be given unless they are claimed in the answer to the appeal.

This case was decided the preceding month; see 18 La. Reports, p. 405.

Chinn, for the garnishees, applied for a re-hearing and correction of the former judgment, especially that part of it giving ten per cent. damages as for a frivolous appeal, when none were asked for by the appellees.

The counsel urged that the court in its zeal to prevent garnishees from manœuvering to keep money of others in their hands without interest, had, he humbly conceived, fallen into a much greater abuse, that of violating positive law.

The court is pleased to make the counsel cut the ridiculous figure of assigning for error in this case, that which had occurred in another. The judgment appealed from in which the errors were assigned and this court called on to revise, was one of *Lee & Hardy vs. Ward, Moffatt & Co.*, defendants. When

EASTERN DIS. the counsel suggested that the inferior court erred in rendering
June, 1841. judgment against the *defendants*, what defendants did he
LEE & HARDY, mean? Surely not the defendant, J. E. Palmer; but only the
vs.
PALMER ET AL. defendants named in the judgment appealed from, and which
 should have undergone revision.

The counsel then went into a critical and elaborate discussion of the merits and proceedings had in the intervention of Elliott & Worley, who claimed the cotton or its proceeds in the hands of the garnishees, and to show that the latter were justified in keeping the money in their hands and were bound to litigate the plaintiff's demand.

The counsel concluded by showing that the court erred in awarding ten per cent. damages. The original judgment already gave eight per cent. interest. The universal practice of the court was not to give damages when the judgment bore interest, or allowed more than five per cent.; 9 *La. Rep.*, 416; 11 *Idem*, 228.

No damages will be allowed when the evidence is contradictory; nor when the appellant honestly thought he was entitled to relief or had a legal defence; 4 *Martin, N. S.*, 619; 5 *Idem*, 664; 7 *Idem*, 367. The court has not the power of awarding damages in this case. It is not even a question of legal or other discretion to grant or refuse it. Whatever power the court possesses is derived from the article 907 of the Code of Practice; and that only allows its exercise when the appellee claims it in his answer. No such claim is set up in the appellees' answer in this case. They or their counsel did not consider themselves entitled to damages, or at least they have refrained from claiming any.

Garland, J. delivered the opinion of the court.

We have attentively considered the petition for a re-hearing in this case. It is a repetition of previous arguments urged in the case or complaints as to the inferences that may be drawn from the opinion of the court. The garnishees also offer the affidavit of their clerk to show they have paid over the

proceeds of the cotton to Elliott & Worley, who claimed it, because, as is said, they thought those intervenors entitled to them. It is not the practice of this court to receive additional testimony on applications for a re-hearing, but if such were the practice, the affidavit does not much strengthen the petition for a re-hearing. It would appear from this statement that the garnishees have assumed to act upon their own ideas of what ought to be done by the court, and decided the case in favor of their friends and paid them the money in contest. As their authority to make such a decision is not admitted, we cannot recognize it. This is not the mode by which a garnishee can be released if he does not wish to keep the thing attached.

The garnishees have called our attention to the allowance of ten per cent. as damages, and allege the plaintiffs did not claim them in their answer to the petition of appeal. Upon examination we find such is the fact. In the argument the plaintiffs counsel claimed the damages, and the suggestion of their not being claimed not being made by the counsel for appellants, we took it for granted and did not examine the joinder in error particularly. This oversight will therefore be corrected; the judgment of this court is therefore amended by disallowing the damages at the rate of ten per cent., and the judgment in all other respects affirmed.

EASTERN DIS.
June, 1841.

LEE & HARDY,
VS.
PALMER ET AL.

The damages allowed by law to the appellee in case of a frivolous appeal, or one evidently taken for delay, will not be given unless they are claimed in the answer to the appeal.

EASTERN DIS. POWER, Tutrix, &c., vs. OCEAN INSURANCE COMPANY.
June, 1851.

POWER,
 TUTRIX, &C.
 vs.

OCEAN INSU-
 RANCE COMPA-
 NY.

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF
 NEW ORLEANS.

Where the insured sells the property, covered by the policy, and afterwards takes it back, on account of the non-payment of her vendee, and is in possession at the happening of the loss, she will recover, although a clause in the policy provides that it shall be void in case of transfer or assignment without the consent of the insurers.

By the implied resolutory clause in her sale, the plaintiff was restored to the possession and ownership of her property before the loss, as if no transfer had taken place.

It is sufficient if the insured has an interest or property in the thing insured, at the time of insuring, and at the happening of the loss.

This is an action on a policy of insurance, to recover the amount of a loss by fire, on property insured in the office of the defendants.

The case turned entirely on the construction to be given to a clause in the policy, providing against any assignment or transfer of the property insured, on pain of nullity, without the consent of the insurers. The fact furthermore appearing that the property had been sold to one Frederick during the continuance of the risk, but which had also been taken back on account of the non-payment of the price, and was in the possession of the *insured*, as owner at the happening of the event or fire which occasioned the loss.

There was judgment for the plaintiff in the sum claimed, and the defendants appealed.

Roselius for the plaintiff.

C. M. & F. B. Conrad for the defendants.

Morphy, J. delivered the opinion of the court.

The plaintiff seeks to recover \$1257 25 under a policy wherein defendants insured her against fire to the amount of \$3000, on household furniture, liquors, bar room fixtures and billiard tables contained in a building situate at the corner of

Champs Elysée and Levee streets, for one year from the 2d of December, 1837. The record shows that after the date of the policy the property insured was sold to one Ursin Frederick and remained in his possession about six months, but that before the happening of the loss, the property reverted back to the plaintiff in consequence of the vendee's failure to pay for the same; and that plaintiff continued in the exclusive possession of it as owner until, within the term covered by the policy, it was damaged by fire. The policy under which the plaintiff claims contains the following clause, "the interest of the insured in the policy is not assignable unless by consent of this corporation, manifested in writing; and in case of any transfer or termination of the interest of the insured, either by sale or otherwise, without such consent, this policy shall from thenceforth be void and of no effect." It is contended that from the very terms of this clause, the policy became absolutely void from the day of the sale to Frederick, and that it could be revived by no subsequent event.

EASTERN DIS.
June, 1841.
POWER,
TUTTIX, &C.
VS.
OCEAN INSU-
RANCE COMPA-
NY.

The decision of this case must rest on the meaning and effect to be given to the foregoing clause inserted in the policy. It seems to us that its object was to render certain, by a positive stipulation, that which otherwise would have depended upon general principles and judicial decisions, to wit: that the policies of the company should not be obligatory any longer than the property insured continued in the individual named in the policy as owner, and that by the transfer of his interest the policy should be void; fraudulent claims upon fire offices have been so frequent that the character of the party proposing to insure has been deemed a matter of importance, and clauses resembling the one under consideration, are now generally to be found in all policies of insurance. It is believed that the nullity they pronounce or imply, according to the terms used, is generally understood as relating to cases where the insured has absolutely and permanently divested himself of all interest in the subject matter of the insurance; being then without any interest at the time of the loss, the insured has sustained no in-

EASTERN DIS.
June, 1841.

**POWER,
TUTRIX, &C.
vs.
OCEAN INSU-
RANCE COMPA-
NY.**

Where the insured sells the property covered by the policy and afterwards takes it back on account of the non-payment of her vendee, and is in possession at the happening of the loss, she will recover, although a clause in the policy provides that it shall be void in case of transfer or assignment without the consent of the insurers.

By the implied resolatory clause in her sale, the plaintiff was restored to the possession and ownership of her property before the loss, as if no transfer had taken place.

jury, and the person to whom a transfer is made without the consent of the underwriters cannot recover, because he is not a party to the contract; thus the policy becomes inoperative and void; but the question here is whether it continues to be ineffectual when at the time of the loss the property is in the assured as it was at the time of the assurance. This policy was clearly intended to cover and did cover any furniture, liquors, fixtures, &c., which plaintiff might have in the house at any time during the continuance of the risk, not beyond the amount actually insured; if these articles had been partially and successively sold and replaced by others, or even if plaintiff had thought proper to provide for her bar room an entire new set of the same articles and a fire had taken place, the underwriters could hardly have pretended, under the clause in question, that they were absolved from the obligation to indemnify; for their undertaking was to insure her from loss against fire, not on the identical effects existing at the time of the insurance, but on effects or articles of the same description that she might have in her establishment within the term covered by the policy. If notwithstanding such a partial or total sale of the effects insured, the policy would continue to be effectual on account of the subsisting interest of the insured at the time of the loss, there is no good reason why it should not be so in the present case; by the effect of the implied resolatory clause in her sale on credit to Frederick, plaintiff was restored to the possession and ownership of the property as if no sale or transfer had taken place; her interest which had been parted with only on condition of her being paid the price cannot be said to have absolutely terminated; during the time Frederick owned the effects, there was, it is true, a suspension of the risk, such as would have taken place had they been temporarily removed from the premises, but the risk revived as soon as the property reverted back to plaintiff. Of this the defendants cannot complain because their liability was thereby diminished.

It is sufficient if the insured has an interest or property in the subject matter of the insurance at the time of insuring

and at the time the fire happens. The nullity mentioned in the clause relied on by defendants, was, in our opinion, intended and understood by the parties for the case where by sale or otherwise an absolute transfer or termination of the interest of the insured should take place so as to leave him without interest at the time of the loss; the stipulation was intended to protect the underwriters from risks they did not choose voluntarily to assume, and to prevent the insured from substituting to himself another person without their consent; La. Code, art. 2040, 2537, 2542; 1 Phillips on Insurance, 34; 3 Maine Rep., 46; Lane vs. Marine Mutual Fire Insurance Company.

EASTERN DIS.
June, 1841.

KENDRICK'S
HEIRS
vs.
KENDRICK.

It is sufficient if the insured has an interest in the thing insured at the time of insuring and at the happening of the loss.

It is therefore ordered that the judgment of the Parish Court be affirmed with costs.

KENDRICK'S HEIRS vs. KENDRICK.

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF ST. HELENA.

In an action to remove an administrator for misconduct or mal-administration, it is not necessary, that all the heirs of the estate under administration join in the suit; such removal may be prayed for by any of the heirs.

This is an action by a portion of the heirs of the succession of Wm. Kendrick, deceased, praying that his widow, the defendant, be removed from her office as administratrix of said succession, on account of her great delay in the settlement and payment of the debts of the same, and for her incapacity to administer said estate.

The defendant, by her counsel, excepted to the petition, because *all of the heirs* of the succession of Wm. Kendrick did not join in the action; setting forth the names of those who were omitted.

EASTERN DIS.
June, 1841.

KENDRICK'S
HEIRS
VS.
KENDRICK.

The judge of probates, on hearing the parties, sustained the exception, and dismissed the suit. The plaintiffs appealed.

Sheafe, argued this case *ex parte* for the plaintiffs and appellants.

Martin, J., delivered the opinion of the court.

This is an action, in which the plaintiffs seek the removal of the defendant, as administratrix of the estate of their ancestor, and as tutrix of some of the heirs who are minors, on account of excessive delay and mis-management of her administration. The plaintiffs are appellants from a judgment sustaining her exception, on the ground that all the heirs have not joined and been made parties; and dismissing the suit.

The court, in our opinion, erred. The Code of Practice, art. 1015, makes it the duty of the judge of probates *ex officio*, to take measures for the removal of a tutor, on the information of his misconduct, given to him by any person. And art. 1018 declares, that "the removal of curators of vacant estates or absent heirs, and that of testamentary executors, or other administrators, may be prayed for by any heir, &c." There was therefore no necessity for all the heirs joining in an application of this kind.

In an action to remove an administrator for misconduct or mal-administration, it is not necessary, that all the heirs of the estate under administration join in the suit; such removal may be prayed for by any of the heirs.

It is therefore ordered, adjudged and decreed, that the judgment of the court of probates be annulled, avoided and reversed: and that the cause be remanded for further proceedings according to law, the defendant and appellee paying the costs of the appeal.

WILSON vs. HIS CREDITORS.EASTERN DIS.
June, 1841.

APPEAL FROM THE COMMERCIAL COURT OF NEW ORLEANS.

WILSON
vs.
HIS CREDITORS.

Where it is not shown, or does not appear that the insolvent was a merchant or trader, or ever kept any books, he will not be denied the benefit of the insolvent laws, for not depositing any in court.

When the evidence of the debt and writ of arrest are produced, it is sufficient to show the debtor is in actual custody, and to entitle him to the benefit of the law for the relief of debtors in actual custody.

This case arises under the insolvent laws of 1808, for the relief of debtors in actual custody. The petitioner set out his affairs in a detailed statement and schedule annexed to his petition containing a list of his debts and the names of his creditors as far as he can ascertain them, and also his property, claims, rights and credits, which he surrendered in open court for the benefit of all his creditors, and made an assignment under oath, upon which the judge presiding discharged him from further imprisonment.

R. L. Baker, an opposing creditor, appealed.

The facts of the case are fully stated in the opinion of this court.

G. B. Ducan, for the appellant, urged the reversal of the judgment on the grounds stated in the opinion which follows :

Simon, J. delivered the opinion of the court.

This is a case in which the plaintiff, a resident of the city of Houston in the republic of Texas, represents himself to be in the actual custody of the sheriff of the parish of Orleans, and claims the benefit of the laws of insolvency, under the act of the 25th of March, 1808. He states that having been arrested on *mesne process* at the suit of Willis Stewart and R. L. Baker, judgments were obtained against him, after which he was surrendered by his securities, and compelled to take the prison limits to prevent the confinement of his person in the walls of the public jail. He annexed to his petition a schedule of his affairs, whereupon the Commercial Court,

EASTERN DIS. granted an order that the petitioner's creditors be notified to appear in open court on the day therein fixed, to show cause
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why he should not obtain the relief by him prayed for.

On the day appointed for the appearance of the creditors, one of them, R. L. Baker, appeared by his counsel, and filed an opposition to the discharge of the applicant, on the following grounds: 1st. That he had not presented to the court a schedule exhibiting a full statement of his affairs, the names of his creditors, their residences, and the nature and amount of the debts respectively due to each of them.

2d. That he has not deposited his books and accounts, nor has he deposited the documents showing his titles to the property mentioned in his schedule.

3d. That he cannot assign to his creditors the property described in his schedule, because the same is real estate situated in Texas; that by the constitution and laws of the said republic, aliens are not permitted to hold or receive any real property, and are expressly forbidden to do so.

4th. That the schedule does not contain a sufficient description of the property surrendered, nor is it accompanied by any title papers or documents by which the assignees could substantiate any claim to the same.

5th. That the petition and schedule are so general and uncertain that it is impossible to acquire any knowledge of the real situation of the applicant's affairs.

And 6th. That the petitioner is not in actual custody, as by him alleged.

This opposition was tried on the day the same was filed, and the grounds therein contained having all been overruled by the inferior court, a judgment was rendered in favor of the applicant, discharging him from the custody of the sheriff, and from imprisonment on all manner of debts which he may heretofore have contracted as set forth in his schedule. From this judgment, the opponent appealed.

It is to be noticed that the opposition is not founded upon any allegation or suggestion of fraud against the insolvent, but

is merely predicated on the imperfect or insufficient statement by him made in his schedule, and upon his not producing his books and accounts.

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HIS CREDITORS.

I. This ground of opposition appears to us untenable: from an inspection of the schedule, the law appears to have been sufficiently complied with; the names of the applicant's numerous creditors are all therein mentioned; as also their residences and amounts due to them respectively, except in the cases where those residences and amounts were unknown to the debtor.

II. There is no evidence that the insolvent was a merchant or trader in Texas or any where else, at the time of his failure; nor is it shown that he ever kept any books and accounts. There is moreover the circumstance of his having, several years before, made a surrender of his property in this State; in consequence of which all the books and papers which he then had, were put in the hands of a syndic, as it is fully explained in his petition and schedule: and no proof has been adduced to contradict the statements therein contained.

Where it is not shown or does not appear that the insolvent was a merchant or trader or ever kept any books, he will not be denied the benefit of the insolvent laws for not depositing any in court.

III. The constitution and laws of the republic of Texas have not been furnished us, it may be true that aliens are not permitted to hold or receive any real estate in that country; yet, in the absence of those laws we cannot say that this ought to and even to the prejudice of the insolvent, who appears to have done all in his power to surrender what he possesses there; and as his estate is to be converted into money to be divided among his creditors, said creditors will perhaps be allowed, under the assignment, to sell the lands surrendered, to Texian citizens, and thereby will attain their object.

IV. It is neither shown nor even alleged that the insolvent had any of his title papers in his possession when he made his surrender; such titles, which must have emanated from the Texian government, may perhaps proceed from land offices and places of record in Texas, where it will not be difficult for the creditors, to trace them.

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V. This general ground has already been disposed of by our remarks on the 1st, 2d and 4th grounds.

VI. The records of the suits of Stewart and Baker against the insolvent, show that he was arrested and held to bail; he also swears he is in actual custody; and the denial of this fact on the part of the opponent, ought to have been supported by evidence.

When the evidence of the debt and writ of arrest are produced, it is sufficient to show the debtor is in actual custody and to entitle him to the benefit of the law for the relief of debtors in actual custody.

On the whole, it seems to us that under the circumstances of the case, and from the explanatory statement contained in his petition and schedule, the insolvent has done all that he could possibly do; and that in the absence of any allegation of fraud against him, the judge *a quo* did not err in granting him the relief applied for under our insolvent laws.

It is therefore ordered, adjudged and decreed that the judgment of the commercial court be affirmed with costs.



19L	36
44	690
19L	36
46	362
19L	30
46	635
19L	36
106	488

KENDRICK'S HEIRS vs. KENDRICK.

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF ST. HELENA.

A sheriff is presumed to be acting in and executing the process of his own parish, when the contrary is not shown; and he is not required to insert the name of his parish in his returns.

The law dispenses with *personal* service, when defendant is absent; but the sheriff's return of service should state expressly that he left the process at the *usual domicil* or residence, with a free person above fourteen years of age, *living there*, the defendant *being absent*.

The citation should state that the answer is to be filed within *ten days after service*; allowing *one day* for every ten miles distance from the residence of the defendant to the clerk's office.

In an action of partition, all the parties interested must be made parties.

This is an action by the forced heirs of Wm. Kendrick, de-

ceased, against the widow in community, for a settlement and payment of the community debts; to recover from her the separate property of their deceased ancestor; and also for a partition of said estate.

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The defendant by her counsel excepted to the plaintiffs' petition on several grounds; that all the heirs had not joined in the action; the sheriff's return omitted to state of what parish he was sheriff; and that the service of citation was defective and illegal, &c.

These exceptions were sustained by the Judge of Probates and the suit dismissed. The plaintiffs appealed.

Sheafe, for the plaintiffs and appellants.

Lawson, contra.

Martin, J. delivered the opinion of the court.

This is an action of partition against the widow in community of the ancestor of the plaintiffs; and they are appellants from a judgment sustaining the defendant's exceptions and dismissing the suit.

The exceptions are, first to the citation and return thereon, because it does not appear in what parish the sheriff acts, or where the domicile or house inhabited by the defendant is situated; and inasmuch as the defendant does not reside in the place where the court is held, or within ten miles, the citation does not express the delay to which the party is entitled in order to comply with the demand of the petition.

Second. There are several individuals and heirs of the plaintiffs' ancestor who have an interest in this action and who are not made parties.

I. In his return the sheriff need not name the parish of which he is sheriff; a sheriff cannot execute process out of the limits of his parish, and the presumption is, that the sheriff who executes and makes return on process is the legal and proper one, when the contrary is not alleged or shown.

A sheriff is presumed to be acting and executing the process of his own parish, when the contrary is not shown, and he is not required to insert the name of his parish in his returns.

II. The Code of Practice, article 189, authorizes the service

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HEIRS.
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KENDRICK.

The law dispenses with *personal* service, when the defendant is absent; but the sheriff's return of service should state expressly that he left the process at the *usual domicile* or residence with a free person above fourteen years of age, *living there*, the defendant being *absent*.

of the citation to be made at the usual domicile or residence of the defendant, *if he be absent*, on a free person above the age of fourteen *and living there*. In the present case the return should have stated the *absence of the defendant from home*, and that the person with whom the citation was left, was *living* there. That person, though found at the defendant's residence, might have been a visitor. In the case of a mercantile firm, the citation may be left *with the clerk at the counting house*; and we have held that service on the clerk, *elsewhere* is bad; *Huntstock vs. his creditors*, 10 La. Rep. 488. In this case the service was made at the proper place, to wit: the domicile of the defendant, but not on a proper person, to wit: *one living there*. The law only dispenses with personal service on the defendant when he *is absent* from home.

III. The Code of Practice, article 174, sec. 5, *requires that* "the citation *must express the number of days* given to the defendant to file his answer, according to the distance from his residence to the place where the court is held, to be reckoned from the day when the citation was served." The citation in this case directs the answer to be filed "*in ten days after service thereof*, and according to law." The article of the Code of Practice, cited above, requires the number of days to be expressed with exactitude, in order to relieve the defendant from the trouble of seeking information and the danger of error. In the present case *ten days* are stated, but there is an additional number of days according to the distance from the defendant's domicile to the clerk's office, of which no notice is taken, except by the words "according to law;" which in our opinion are too indefinite, as they do not relieve the defendant from the trouble and danger mentioned. The citation should have stated that the answer was to be filed within ten days after service, and allowing one day for every ten miles distance from the residence of the defendant to the clerk's office.

The citation should state that the answer is to be filed within *ten days after service*, allowing *one day* for every ten miles distance from the residence of the defendant to the clerk's office.

In an action of partition, all the parties interested must be made parties.

IV. In an action of partition, all the parties, interested therein, must be made parties. Vide *Harrell vs. Harrell et al.*, 16 La. Rep., 374.

It is therefore ordered, adjudged and decreed that the judgment of the Court of Probates be affirmed with costs.

EASTERN DIS.
June, 1841.

SLATTER
vs.
HOLTON.

SLATTER vs. HOLTON.

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF NEW
ORLEANS.

Positive testimony cannot be destroyed by the negative proof of witnesses who testified that they did not see a certain slave on board the defendant's steamboat.

This is an action to recover the sum of \$1600, the value of a slave, which the plaintiff alleges the defendant carried away from the State of Louisiana in the steamer Henry Clay, on or about the 10th January, 1837, whereby he was totally lost. The plaintiff had the steamer Henry Clay sequestered, and claims a privilege thereon for the price and value of his slave.

The defendant pleaded the general issue; and reconvened the plaintiff in damages to the amount of \$2000, for the illegal and unjust detention of his steamboat in two instances about this suit; having discontinued the first proceedings instituted by him.

Upon these issues the parties went to trial. Many witnesses were examined on both sides, and the case submitted to the court.

The parish judge was satisfied that the plaintiff fully made out his case, from the evidence and gave judgment for the sum claimed. The defendant appealed.

Strawbridge, for the plaintiff.

Chinn, contra.

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June, 1841.

Morphy, J. delivered the opinion of the court.

SLATTER,
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HOLTON.

Plaintiff seeks to recover the value of a slave named Shadrack who, he alleges, was carried out of the State without his knowledge and consent on board of the steamboat Henry Clay, whereof the defendant was master, on or about the 10th of January, 1837. The answer denies the facts set forth in the petition, and sets up a reconventional demand of \$2000 damages for the unlawful and unjust detention of the boat in this suit; and for the expenses and trouble imposed on defendant in causing her to be released from former proceedings instituted by plaintiff against her, but afterwards discontinued. There was a judgment below in favor of plaintiff, from which defendant prosecutes the present appeal.

This case presents no question of law, and the matters of fact which it involves have been determined in favor of plaintiff. An attentive examination of the evidence does not enable us to say that there is error in the judgment complained of. However strong may appear the negative proof resulting from the declarations of several witnesses that they did not see the plaintiff's boy on board the Henry Clay during her voyage from New Orleans to Louisville, it cannot destroy the positive testimony in the record showing that during the trip the boy was acting on board as one of the servants of the boat under the name of Jim Thornton. The testimony shows that the Henry Clay left New Orleans on or about the 10th of January, 1837, for Louisville; that while she was lying below the Cumberland bar, where she was stopped by the low stage of the waters, a steamboat called the *Wave*, which was passing from the river Cumberland into the Ohio, came alongside the Henry Clay to take off her passengers; that plaintiff's boy was seen waiting at the supper table in the cabin of the latter boat, and aided in carrying the baggage of the passengers from the Henry Clay on board of the *Wave*; that besides the passengers, the boy Jim Thornton together with three other servants were received on board the *Wave* at the instance of defendant who

Positive testimony, cannot be destroyed by the negative proof of witnesses who testified that they did not see a certain slave on board the defendant's steamboat.

requested the captain of this boat to allow such of these cabin boys as might be wanted to work their passage, adding that the others would pay but expressing a wish that he should be moderate in his charges; that the boy Shadrack or Jim Thornton being remarkably active about the table was permitted to work his passage above Flint Island, when he was discharged and never afterwards heard of; that at some distance further up in the Ohio, the Wave fell in with the steamboat Tuscarora, from which other passengers were taken, and among them a Mr. Peterson, who instantly recognized Jim Thornton as being the boy belonging to the plaintiff, under the name of Shadrack; being perfectly satisfied of the identity of the slave, this witness urged the captain of the Wave to arrest him as a runaway, but the latter declined to do it; saying that the boy had been put on board of his boat by defendant, who would not have done it without authority, and that moreover defendant was responsible for the boy in case he should be a slave; but it is said that there is not a particle of testimony going to show that either Slatter, or Armstrong, his vendee, who brought this suit for his use, ever had any title to this slave, or that the boy Shadrack was ever at any time within the limits of this State. It was admitted on the trial of the cause "*That Slatter had returned to Armstrong the purchase money (\$1600) of the slave mentioned in the plaintiff's petition.*" With such an admission, the plaintiff's counsel did not perhaps suppose that either the title to, or the possession of the slave would be disputed nor do these points appear to have been made below. Although no evidence was taken or particularly directed to these facts, we find in the record testimony, admitted without objection, which satisfies us of the ownership and possession of plaintiff in Louisiana. Peterson declares that he told the captain of the Wave that the boy passing by the name of Jim Thornton belonged to S. F. Slatter, of New Orleans; that he had been present when H. H. Slatter, the plaintiff's brother bargained for the boy Shadrack with Mr. Tate, in the city of Baltimore; and that he afterwards saw him put on board of a brig at Alexandria,

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(District of Columbia,) to be sent to the plaintiff at New Orleans. From the circumstance that other boats were lying near the Henry Clay at the mouth of the Cumberland river, it has been contended that plaintiff's boy may have been taken up the river by any one of these boats and that he may have got on board of the Henry Clay at that place, as there was a free intercourse between these boats for several days. This bare possibility cannot avail the defendant; when the proof is abundant that the defendant knew of the boy being on his boat as a servant, and recommended him to the captain of the Wave. The good character and excellent reputation which the testimony establishes for the defendant, and which he no doubt deserves, entirely acquits him of any improper motives; but cannot relieve him from the consequences of his neglect to comply with the formalities required by our laws in relation to persons of color; 1 Bullard & Curry's Digest, 253, sec. 1 and 2; Session acts of 1835, p. 152.

It is therefore ordered that the judgment of the Parish Court be affirmed with costs.

**CALDWELL ET AL. vs. WESTERN MARINE AND FIRE
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APPEAL FROM THE COMMERCIAL COURT OF NEW ORLEANS.

A competent crew is necessary to the sea worthiness of a boat or ship; but if one is provided, the occasional absence from the vessel of a hand or seaman on the business of the voyage does not defeat the policy, especially when his presence could not have prevented the accident.

A strong case of necessity is required to justify a master in selling his boat or vessel and cargo, if other means of saving either be within his reach. But where he acts with fairness and uses all proper diligence to save both he will be justified by the necessity of the case in selling both the boat and cargo.

This is an action on an open Policy of Insurance taken out of the office of the defendants, by Lambeth & Thompson, commission merchants in this city, for the benefit of whom it might concern. They were the consignees of 61 hogsheads of Tobacco, shipped from Hatcher's landing on Green River, in Kentucky, on board of the flat-boat Columbus, the beginning of January, 1838, and wrecked before getting out of said river. The boat was *hauled* ashore at the first convenient landing place, the tobacco taken out and sold in a damaged state. The captain and crew made their protest, notified the owners, (the plaintiffs) who abandoned as for a total loss, to the insurers, (defendants.)

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The plaintiffs allege the tobacco was covered by this policy and worth \$60 per hogshead. They claim the sum of \$3660 with interest; and \$284 for money laid out and expended in saving the tobacco from the wreck for the benefit of the defendants. They pray judgment for these sums.

The defendants admitted the execution of the policy sued on, and pleaded the general issue: They averred the sale of the tobacco by the master of the boat was illegal and unauthorized, and that they are in no manner liable.

There was a mass of testimony taken on the trial which is detailed in the opinion of this court, in relation to all the points or grounds of defence.

The jury returned a verdict of \$3944 with legal interest. The plaintiffs remitted the sum of \$1074 25, which left the sum of \$2869 75, and for which judgment was rendered, with legal interest from judicial demand.

The defendants appealed.

Peyton & Jones, for the plaintiffs.

Maybin & Grymes, for the defendants.

Garland, J. delivered the opinion of the court.

This action is brought on an open policy of Insurance taken

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by Lambeth & Thompson, for the benefit of whom it may concern, upon tobacco shipped on flat-boats from any point or landing on the Ohio River or its tributaries, directly or indirectly, consigned to them in New Orleans.

In January, 1838, the plaintiffs shipped on a flat-boat from a ware-house on Green River in Kentucky, sixty-one hogsheads of tobacco, consigned to Lambeth & Thompson, which it is alleged are included in the policy at the rate of sixty dollars per hogshead.

It is alleged and proved that the tobacco was shipped on board of a flat-boat, staunch and tight, and in all respects fitted for the voyage, having a competent steersman or master and the ordinary number of men as a crew. In descending Green River in daylight, in a place where a snag was not previously known to be, the water from ten to fifteen feet deep, with a smooth current and in a long reach of the river, the boat struck upon a snag which made a hole through her bottom and in a few minutes she sunk, one end hanging upon the snag. The master and crew appear to have used every effort in their power to save the boat and cargo. Assistance was procured as soon as practicable, and the boat after being got off the snag was taken to the nearest landing, her deck only being above water, and the tobacco landed as soon as practicable, but some of it was in the water three days and all nearly two days. As soon as possible the master called on the senior justice of the peace of the county for advice, as to the best course to pursue, that person not knowing what was best to be done, went with the master to the clerk of the county, at whose suggestion the parties went to the judge of the district, and by the advice and direction of that gentleman the master made his protest and took measures to have the tobacco sold, as no other boat could be had to reship it, and the master had neither means or shelter to open the hogsheads, dry the tobacco and repack it. No regular survey or appraisalment was made of the boat or cargo previous to the sale.

The plaintiffs or their agents, as soon as they heard of the

wreck, made an abandonment and claim as for a total loss. **EASTERN DIS.**
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 The remaining facts will be stated in connection with the grounds of defence. The defendants having appealed from the judgment given against them.

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The first ground relied on for a reversal of the judgment is, that the boat became unseaworthy or unfitted for the navigation during the voyage, and was so at the time of the loss, by not having on board a sufficient crew. It is in evidence that the ordinary crew of a boat is three persons, that is, a steersman and two hands. At the time of the loss one of the hands had taken the canoe belonging to the boat and gone ashore to purchase some sugar for the use of those on board. He was at a short distance when the accident occurred. It is further shown, that at the time the boat was in smooth water and in a part of the river considered safe. Several of the witnesses who have navigated the river for years say they never saw a snag in that place before, and another boat was a few yards ahead which passed over or very nearly over the same spot in safety. A person who was superintending the works going on to improve the navigation of Green River says, that in consequence of the number of trees felled on the banks snags had become fixed in places where they were not before, and the best navigators might be deceived. It is further shown, that if the absent man had have been on board, he could not have prevented the accident, as no danger was anticipated. Several witnesses depose that if five times the number of the ordinary crew had been on board the accident could not have been prevented.

It is as unquestionably true that a competent crew is requisite to seaworthiness as having a competent master, and the necessary tackle and apparel, and if the vessel is not properly furnished in that way when she commences her voyage, it is a cause for avoiding the policy; 1 Phillips on Insurance, 312 *et seq.* But if a competent crew is provided for the whole voyage, the policy is not defeated by the occasional absence of some of the sailors on other duties in the course of it. A ship

A competent crew is necessary to the seaworthiness of a boat or ship; but if one is provided, the occasional absence from the vessel of a hand or seaman on the business of the voyage does not defeat the policy; especially when his presence could not have prevented the accident.

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at sea, might under particular circumstances be compelled to have a portion of her crew absent for very necessary purposes and a loss take place during their absence in search of water or provisions, yet we think the policy would not be avoided in consequence. Mr. Justice Bayley held in the case of *Busk vs. Royal Exchange Assurance Company*; 2 Barnwell & Alderson, 73; "The owner is bound in the first instance to provide a ship with a competent crew, but he does not undertake for the conduct of that crew in the subsequent part of the voyage;" 1 Phillips on Insurance, 314—15.

In this case, when the boat struck, the man was absent for a necessary purpose, and there was certainly less risque in sending him ashore in a pirogue to purchase necessary supplies than to land the flat-boat in a swollen stream with banks incumbered with fallen timber.

This case is very different from those in 6 Martin N. S. 53; and 14 La. Rep. 489. We think the plaintiffs have proved the boat was *river worthy* notwithstanding the absence of one of the crew, and according to the authorities cited from 3 Mason, 439, and 2 Washington 152, 375, they have sustained this part of their case.

A strong case of necessity is required to justify a master in selling his boat or vessel and cargo, if other means of saving either be within his reach. But where he acts with fairness and uses all proper diligence to save both he will be justified by the necessity of the case in selling both the boat and cargo.

The second ground of defence is, that the sale was unnecessary. It is certain that a strong case of necessity must be made out to justify a master in selling a vessel or cargo, if other means of saving either be in his reach; and he must avail himself of all proper diligence, (taking his situation and the condition of the vessel and cargo into consideration,) to procure the means; Abbott on Shipping, p. 2, *et seq.*

In this case it seems to us the master of the boat acted with great discretion and fairness. As soon as his boat sunk he used every effort to get it to the shore and succeeded, although full of water and sunk to the deck. He procured all the assistance in his power to assist in landing the tobacco, and got out every hogshead as soon as practicable, though much damaged. He applied to persons presumed to be most competent to advise him, what was best for the interest of all concerned.

The sale appears to have been fairly conducted, and advertisements sent into as many as four counties from seven to nine days previous to it, and persons attended from a distance of more than forty miles to bid. Two companies were formed who bid against each other, and the tobacco was cried for more than two hours and sold for \$1075.

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It is shown the master could not have procured another boat to ship the tobacco on, or raise and repair the one sunk, and it is further shown that if he had been able to do so, the tobacco would have been rotten before it could have reached New Orleans. Two witnesses engaged in the tobacco business in this city state such to be their opinion, and relate an instance where a cargo of tobacco was sunk near Helena, in Arkansas, remained in the water only six or eight hours, then brought to the city in a steamboat, and the loss was sixty-two per cent. That it would have been total, if brought from Green river, in Kentucky, on board of a flat-boat we cannot doubt.

The defendants say the master and crew should have opened the hogsheads and dried the tobacco. The evidence on this point satisfies us that it was not in his power to do so. For that purpose it was necessary to have a number of houses or barns in which the tobacco could have been hung up. After it was dried it was necessary to let it remain suspended, until the weather should make it sufficiently moist to be handled without injury, so as to put it in bulk and then into the hogsheads. All the witnesses who saw the tobacco, say that at the place where it was lying, no shelter or covering could be had to put the hogsheads under, after they were taken from the water, and they were exposed on the bank nine days. On the day of the sale, water was still draining from some of them. The tobacco was purchased by a company, composed of persons in the neighborhood, by whom it was hauled to several plantations, where it could be opened, and the necessary houses and presses or *prizes* found for the drying and repacking it. Brown, one of the purchasers, says, that sixteen hands were employed

EASTERN DIS. nearly two months, before the boat could be raised and repaired
June, 1841. and the tobacco in a condition to be shipped again. The wit-
CALDWELL nesses state the tobacco sold for fully as much as it was worth,
vs. and we are satisfied such an eminent necessity existed for the
WESTERN sale as to justify the master in acting as he did.
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The judgment of the Commercial Court is therefore affirmed with costs.

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ON AN APPLICATION FOR A RE-HEARING.

When the judgment of this court is confined to the points filed or raised in the argument of the case, it will not listen to an application for a re-hearing on other grounds suggested after the cause has been decided.

Maybin & Grymes, for the defendant, suggested there was error in the judgment of the court, rendered in this case, in *allowing interest*. They asked for a re-hearing and a revision of the judgment in this respect; and cited in support of their application the following authorities: *C. Pr. 554*; *7 La. Rep., 134, 596*; *8 Idem 572*; *11 Idem 236*.

Garland, J. delivered the opinion of the court.

The defendants apply for a re-hearing in this case, on the ground that the verdict and judgment of the court below gives the plaintiffs legal interest from judicial demand.

The objection now raised was not stated in the points filed, and the first complaint is after the judgment has been affirmed. This court in the investigation of the cases that come before it, pay all proper attention to the points made by counsel, but do not feel bound to confine their examination to them exclusively,

and therefore sometimes decide upon grounds that counsel have not suggested, but it may happen, that points not suggested sometimes escape our attention, or on examination do not seem to require our interference; but that is not a ground for a re-hearing. When we decide a cause on grounds not suggested by counsel, we always listen with pleasure to any reasons that may be suggested, to induce a revision of our opinions, but when our judgments are confined to the points filed, we will not listen to a re-hearing on other grounds, suggested after the cause has been decided. The re-hearing is refused.

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When the judgment of this court is confined to the points filed or raised in the argument of the case, it will not listen to an application for a re-hearing on other grounds suggested after the cause has been decided.

**PAGE vs. WESTERN MARINE AND FIRE INSURANCE
COMPANY.**

APPEAL FROM THE COMMERCIAL COURT OF NEW ORLEANS.

The bill of lading is sufficient evidence of ownership, to entitle the shipper to recover the insurance; even against the testimony of witnesses to the contrary.

A fair and *bona fide* sale of damaged property under circumstances that render its shipment to the port of destination impossible, except in a very damaged condition, is the best that can be done for all concerned, and underwriters have no cause of complaint.

This is an action on a policy of insurance taken out of the office of the defendants, by Lambeth & Thompson, in the usual form, declaring on its face to be for the benefit of whom it may concern. It is alleged to cover two cargoes of tobacco, shipped in two flatboats from Big Barren river in Kentucky, by and in the name of the plaintiff, and consigned to the said Lambeth & Thompson, commission merchants in New Orleans. The tobacco is by a memorandum endorsed on the policy, valued at \$60 per hogshead. The boats were both sunk and

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the tobacco almost an entire loss, by the accidents and perils insured against. The masters of the boats made sales under the necessity of the case, at the place where the property was damaged, and the plaintiff abandoned to the underwriters as for a total loss. He now claims the value of 87 hogsheads of tobacco, at the rate of \$60 per hogshead, amounting, together with expenses incurred in saving the damaged tobacco, to \$5352 50; after deducting \$454, the sum for which it sold.

The defendants, after admitting the execution of the policy, pleaded the general issue, and denied specially the legality of the sales of the damaged tobacco, and every or any liability whatever.

The case was tried on these pleadings and issues, and submitted to a jury on the evidence. It turned principally on the evidence and facts; all of which are fully stated in the opinion of this court.

There was a verdict and judgment in favor of the plaintiff, for \$5220: after an unsuccessful effort to obtain a new trial, the defendants appealed.

Jones & Peyton, for the plaintiff.

Maybin & Grymes, for the defendants.

Morphy, J. delivered the opinion of the court.

On the 16th of October, 1837, the defendants underwrote a policy of insurance to Lambeth & Thompson, commission merchants, on account of whom it may concern, upon tobacco shipped or to be shipped to the latter, at or from any point or landing on the Ohio river or its tributaries, to New Orleans, between the 25th of September, 1837, to the 1st of March, 1838. By a memorandum added to the policy on the 8th of January following, the valuation on the tobacco insured was, by consent, raised from fifty to sixty dollars per hogshead. On the 20th of January, 1838, the plaintiff, a resident of Barren county, State of Kentucky, shipped from two places on Big Barren river, a tributary of the Ohio river, two cargoes of

tobacco ; the one consisting of sixty-two hogsheads, in the flat-boat Benjamin Franklin, whereof Benjamin Ritchey was master, and the other of twenty-five hogsheads, in the flatboat Sam Brown, of which John Brown was master ; the tobacco was consigned to Lambeth & Thompson in New Orleans, with instructions to effect insurance thereon. On their way to the port of destination, the Benjamin Franklin ran against a root or snag concealed under the water, near the mouth of Philips' Branch, in Barren river, and the Sam Brown sprung a leak at a short distance from that place, by which accidents both the boats sunk. The tobacco on board of them, having remained some time under water before it could be withdrawn, was found to be materially damaged ; whereupon the masters of these boats, after making their protest and giving due notice by advertisements, proceeded to sell, and did sell at public auction the said tobacco for the benefit of all concerned. Under these circumstances, the plaintiff claims under the aforesaid policy as for a total loss. The defendants deny the facts set forth in plaintiff's petition, or that they be indebted to the plaintiff in any amount whatever. They aver that the sales alleged to have been made, were illegal and pretended ; that the flatboat Sam Brown was not seaworthy at the beginning of, nor during the voyage insured ; and that the plaintiff has no cause of action whatever against them. The case was laid before a jury who brought in a verdict for the plaintiff in the sum of \$5220 : a remittitur having been entered for \$403, the nett proceeds of the sale of the damaged tobacco. Judgment was rendered accordingly. After failing in an attempt to set aside this verdict and judgment, the defendants appealed.

It is not denied, that these shipments of tobacco to Lambeth & Thompson were covered by the policy sued on, or that an abandonment was made to the Company ; but it is said, that plaintiff shares an interest only in four of the hogsheads on board of the Benjamin Franklin ; that the balance of the tobacco belonged to a number of other persons, whose names are marked on the hogsheads, and that the plaintiff can recover

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EASTERN DIS. only to the extent of his interest. The testimony in the record on this head cannot, in our opinion, outweigh the evidence

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The bill of lading is sufficient evidence of ownership to entitle the shipper to recover the insurance; even against the testimony of witnesses to the contrary.

resulting from the bill of lading, which is in the name of plaintiff. He had the possession, custody and control of the tobacco, coupled with a legal title to the same. It would be strange indeed, that an interest which would give him a right of action for the property as his own, should not be susceptible of being insured. Admitting that the plaintiff had an absolute and entire right of ownership only to four of the hogsheads insured on board of the Benjamin Franklin, yet as trustee or agent of the owners, he had in the balance of the cargo such a qualified interest, as authorized him to protect it by insurance. 2 Phillips, 511-740; 1 Peters, 163; 10 Pickering, 40; 3 Mass., 133; 4 Wendell, 75.

In relation to the necessity of the sale and the seaworthiness of the boats, we think that the evidence preponderates in favor of the plaintiff. A number of witnesses, and among them the builders of these flatboats, declare that they were strong and substantial, and well fitted for the navigation of the Ohio, Barren and Mississippi rivers; that they were provided with an experienced steersman, a sufficient number of hands, &c., with every thing necessary to boats of this description. The circumstance of the springing of a leak in the Sam Brown, shortly after her departure, cannot of itself create a presumption of unseaworthiness, for the witnesses say, that such accidents not unfrequently happen to the best flatboats, and from causes that cannot sometimes be ascertained; but even if such a presumption existed, it must yield to the positive proof given in this case, that the boat was a new one, staunch and seaworthy in every respect. The springing of a leak is surely one of the perils insured against. As to the Benjamin Franklin, she struck against a root or snag concealed under the surface of the water, and sunk in spite of every exertion made to prevent the accident. The tobacco saved from the wreck had remained immersed in the water or floating on its surface between thirty and forty hours; when rescued it was found so

thoroughly saturated with water and damaged, with the exception of a few hogsheads, as to be considered as almost worthless; all the witnesses, but one, assess the damage at 75 per cent. Suitable warehouses and the necessary apparatus for drying and reprizing the tobacco, were not to be procured near the spot where the accidents happened; and the witnesses, even those who thought that the tobacco could have been dried and reprized, express the opinion that the expenses would have amounted to more than the damaged tobacco would have brought in New Orleans. One of them (Foster) says, that the tobacco was so much damaged, that he would not have accepted it as a gift.

Under such circumstances a sale was surely, as most of the witnesses declare, the best thing that could be done for the interest of all parties concerned; and the evidence shows that on occasions of this sort, it is the course generally pursued in that section of the country. No newspapers being published at a distance less than twenty-five or thirty miles, notices of the sale were posted up at different places in the neighborhood during five or six days, and the sale was well attended. Every thing from the evidence before us appears to have been conducted with fairness and with a view to do the best according to the circumstances of the case. That a master may, in case of necessity for so doing, sell the ship or cargo damaged, has never been doubted, but it must be done *bona fide* for the benefit of all concerned; as to what is a case of necessity and what is not, depends upon the particular circumstances and is a question of fact to be determined by the jury; the evidence in our opinion fully justifies the conclusion to which they have arrived; 2 Phillips on Insurance, 315, 327, and 328.

But it is contended that the sale was merely pretended and simulated and that the plaintiff by his acts of interference with the property has revoked his abandonment and can now claim only for a partial loss. There is no proof that the plaintiff became the purchaser of any portion of the tobacco saved; but from the fact that a part of it was bought by his brother-in-law, and that

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A fair and
bona fide sale
of damaged
property under
circumstances
that render its
shipment to the
port of destination
impossible,
except in a very
damaged condition,
is the best
that can be done
for all concerned,
and underwriters
have no cause of
complaint.

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it was afterwards placed under the plaintiff's care to be dried, and re-shipped in two of his boats and one of them having sunk the plaintiff, in whose charge it was, gave orders in relation to it; the inference is drawn, or attempted to be drawn, that the plaintiff was himself the purchaser. This inference has not been adopted by the jury, and we cannot say that they erred. The acts of the plaintiff which are represented and insisted on by the defendants as acts of interference and ownership, sufficient in law to revoke the abandonment, may each and every one of them have been done by him, as the agent of his brother-in-law, the purchaser. The capacity in which he acted was a matter of fact peculiarly within the province of the jury, and we can see nothing in the evidence which makes it our duty to disturb their verdict.

It is therefore ordered, that the judgment of the Commercial Court be affirmed with costs.



VAUGHAN vs. WESTERN MARINE AND FIRE INSURANCE COMPANY.

APPEAL FROM THE COMMERCIAL COURT OF NEW ORLEANS.

The master of a boat or vessel whose cargo is damaged by the perils insured against, so as to render its re-shipment inexpedient and unprofitable, has authority to sell it for the best price at the place, and for the benefit of all concerned.

If a person acts merely as the agent of his son-in-law, at the sale of his own property, and in superintending it afterwards, he will not be considered as interested, or his acts viewed as an interference with the property, or as an exercise of ownership over it.

When an important fact, submitted to a jury, is not positively proved, but only *inferred* from the evidence, their verdict is entitled to great weight; and will not be set aside unless manifestly erroneous.

This is an action to recover of the insurers the value of six-ty-three hogsheads of tobacco, estimated at \$50 per hogshead, which is alleged to have been covered by an open policy of insurance taken out of the office of the defendants by Tiernan, Cuddy & Co., commission merchants, for the benefit of all whom it might concern. The tobacco was shipped on board a flat boat in Green river, Kentucky, and consigned to these commission merchants in New Orleans, but the boat struck a snag and sunk in said river. The tobacco was taken out in a damaged state, and sold on the bank by the master, for the benefit of the underwriters.

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The plaintiff abandoned as for a total loss, and claims the sum of \$3150, the value of the tobacco, and also the expenses of taking it out of the river and selling it, after deducting the amount of the sales.

The defendants pleaded the general issue and denied all liability. They aver that the sale of the damaged tobacco was illegal, pretended and fraudulent, and that the flat boat was unseaworthy, &c.

The case was submitted to a jury with a mass of testimony, upon which they returned a verdict in favor of the plaintiff for the sum of \$2950, the value of fifty-nine hogsheads of tobacco. After an unsuccessful attempt to obtain a new trial, from judgment confirming said verdict, the defendants appealed.

C. M. Jones, for the plaintiff.

Maybin, for the appellants.

Morphy, J., delivered the opinion of the court.

This action is brought on an open policy of insurance underwritten by defendants in favor of Tiernan, Cuddy & Co., for whom it may concern. The plaintiff claims, as for a total loss, the value of a certain number of hogsheads of tobacco, which he alleges were shipped by him to the address of the said Tiernan, Cuddy & Co., commission merchants in New Orleans, from Caldwell's point, on Green river, State of Kentucky. The

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petition sets forth that the flat boat No. 4, of which John Martin was master, started from the aforesaid place in June, 1837, having on board the said tobacco; that the said boat which was good and sound at the time of departure, proceeded down the river to a point called Roach's Landing, to take in the balance of her cargo; that while she was lying at this place, detained by low water, she sunk on account of having been injured either by striking on a log or in consequence of injury from the winds or both, by which accident a total loss of said tobacco occurred by one of the perils insured against, to wit: the dangers of the river. The defence is that the boat was not seaworthy at the commencement of and during the voyage insured; that the sale made of the damaged tobacco was illegal, pretended and fraudulent on the part of plaintiff, the same having been bought in by him or on his account and for his benefit, and that the plaintiff has no cause of action, whatever, against the underwriters.

This case presents the same questions of law as that of Page against the same defendants, decided this day. The facts of the two cases do not materially differ and the evidence in both is much the same in relation to the circumstances attending the loss, the seaworthiness of the boats and the necessity of the sale of the damaged cargo, made by the masters. It is therefore deemed unnecessary to go into a detail of all the testimony which is extremely voluminous; an attentive examination of it does not enable us to say that the jury erred in the view they took of it.

The point most insisted upon by defendants is the nullity of the sale and the effect of the interference of the insured with the property after the abandonment. The evidence shows that as soon as the tobacco was rescued from the river, a survey of it was called by the master and the damage assessed at seventy per cent. There being no newspaper published at Greensburg, written advertisements of the sale were posted up at different public places during four or five days. The tobacco was sold in lots of nine or ten hogsheads, about the middle

of the day, and a good many persons were present at the sale; the tobacco brought \$557 50, which was considered as a fair and even a high price in its damaged condition. Several witnesses express the opinion that the best disposition which could possibly have been made with the cargo at that season of the year was to sell it on the bank where it was landed, and that had it been removed to Greensburg or re-shipped to New Orleans, it would not have brought the sum which it sold for, after deducting necessary expenses; that this course is generally pursued on Green river and that it is the most beneficial to the interests of the underwriters. The plaintiff was present at the sale and the tobacco was purchased by J. G. White, his son-in-law. After the sale the damaged tobacco was opened, dried and re-packed under the superintendence of the plaintiff, and about three months after the sale, it was re-shipped for New Orleans by the orders of the plaintiff, and placed in a warehouse. From these circumstances the defendants contend that plaintiff was himself the purchaser of the tobacco; that he could not buy at a sale made by himself as agent of the underwriters, and can now claim only for a partial loss as if no sale had taken place.

The witnesses declare that they cannot say whether the plaintiff had an interest in the tobacco purchased by his son-in-law, or whether he attended to all this on behalf of the latter. This question of fact the jury decided in favor of the plaintiff. If he was acting only as the agent of the purchaser, his acts cannot be viewed as an interference or such an exercise of ownership over the property as can amount to a waiver of the abandonment. When an important fact in a case submitted to a jury is not positively proved by, but is only to be inferred from the evidence, their verdict is entitled to great weight. As we have often had occasion to say, we will interfere with a verdict on questions of fact only when it is manifestly contrary to the positive evidence of the case.

The judgment of the Commercial Court is therefore affirmed with costs.

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June, 1841.**

**VAUGHAN
vs.
WESTERN
MARINE & FIRE
INSURANCE CO.**

The master of a boat or vessel, whose cargo is damaged by the perils insured against, so as to render its re-shipment inexpedient and unprofitable, has authority to sell it for the best price at the place, and for the benefit of all concerned.

If a person acts merely as the agent of his son-in-law, at the sale of his own property, and in superintending it afterwards, he will not be considered as interested, or his acts viewed as an interference with the property or as an exercise of ownership over it.

When an important fact, submitted to a jury, is not positively proved, but only inferred from the evidence, their verdict is entitled to great weight, and will not be set aside unless manifestly erroneous.

EASTERN DIS.
June, 1841.

HAMER & CO. vs. LAWRENCE ET AL.

HAMER & CO.
vs.

APPEAL FROM THE COMMERCIAL COURT OF NEW ORLEANS.

LAWRENCE ET AL.

Where the evidence showed that the sale from the defendant to the intervenors, was only to give the latter a colorable claim to the property (or cotton;) the sale was held to be made for the purpose of protecting it from the pursuit of creditors, and void.

So, where it appeared the defendant gave orders to the intervenors to ship his cotton in their names, it was held, that the legal possession and control over it remained in him, as owner, through the interposition of these persons as *his agents*.

This suit commenced by attachment. The plaintiffs who reside in the State of Mississippi, allege the defendants, Lawrence and Cattling, also non-residents, are justly indebted to them in the sum of \$4000, with interest, and that their debtors have property within the jurisdiction of the court, which they pray may be attached; and that they have judgment for the amount of their said debt, to be satisfied from the proceeds of such property as they may find belonging to their said debtors.

An attorney to represent the absent defendants was appointed, who put the cause at issue, when Messrs. Elliott & Worley of Mississippi, intervened, claiming one hundred and eighty-one bales of the cotton, which had been attached as the property of the defendants, to belong to them.

The contest was between the plaintiffs and intervenors. There were several depositions read on the trial, taken in Mississippi, touching the ownership of the cotton. One of the most material items in the evidence adduced on the trial, is the following note from one of the defendants.

“HOLMES Co., *February, 1840.*”

“Messrs. Elliott & Worley, or R. A. Moffett,

Will ship my cotton at Parker's Landing, to Ward, Moffett & Co., New Orleans, when directed by R. A. Moffett, when so to do. My cotton is marked *H.*”

“JAMES CATTLING.”

There was judgment dismissing the petition of intervention, *EASTERN DIS.*
June, 1841.

HAMER & CO.
vs.
LAWRENCE ET
AL.

L. C. & G. B. Duncan, for the plaintiffs and appellees.

Chinn, for the appellants.

Simon, J. delivered the opinion of the court.

Plaintiffs seek to recover a sum of four thousand dollars, to secure which they sued out a writ of attachment which was levied on one hundred and eighty-eight bales of cotton, as the property of the defendants. During the progress of the suit, a petition of intervention was filed by Elliott & Worley, residents of the State of Mississippi, in which they state themselves to be the owners of the cotton attached, having caused the same to be shipped to New Orleans, and pray that said cotton be decreed to them, &c. The plaintiffs answered said petition of intervention by pleading the general issue; and judgment having been rendered below against the intervenors, the latter appealed.

The intervenors have attempted to establish their title to the cotton attached, as proceeding from a sale made to them by James Cattling, one of the defendants; and have also endeavored to show a delivery of the same previous to its being shipped to New Orleans; for this purpose they have been obliged to resort to the testimony of the defendants themselves, from whose evidence it appears that through the interposition of R. A. Moffett, of the house of Ward, Moffett & Co., of New Orleans, a certain order was given by Cattling in favor of the intervenors or R. A. Moffett, to ship his cotton at Parker's Landing on the Yazoo river, to Ward, Moffett & Co., when directed by R. A. Moffett so to do. This written order was delivered in consequence of certain arrangements made between Cattling and Moffett for the purpose of satisfying an execution which had been issued against Cattling, at the suit of the firm of Ballard, Franklin & Co.; these arrangements having failed, Cattling undertook to sell his cotton to the inter-

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**CARROLLTON
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NO. 2.**

the result of a collusive understanding between them and the defendants. But however it may be, it is evident that the cotton has never been delivered to nor paid for by the intervenors, since from Catling's testimony, it is shown that having taken a check for the price of the property, he returned it to Elliott & Worley, and thereby cancelled the sale. We are of opinion that the judgment appealed from ought not to be disturbed.

It is therefore ordered, adjudged and decreed that the judgment of the Commercial Court be affirmed with costs.

191 62
45 1411
191 62
47 104
191 62
50 1257

CARROLLTON RAIL ROAD COMPANY vs. MUNICIPALITY

NO. TWO.

**APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF
NEW ORLEANS.**

Ancient plans of a city are admissible in evidence to prove the boundaries of lots sold in reference thereto, and the direction of streets so far as they may extend, although not including the *locus in quo*; and especially when one of the parties claims under those who caused the plans to be made.

Where a canal and basin figure on the original plan of a city, but are always used and sold by the proprietors, they will be considered as private property.

In order to dedicate property to *public uses*, there must be a plain and positive intention to give and one equally plain to accept. The *form* is not material.

This suit is in the nature of a petitory action in which the plaintiffs seek to be confirmed in their title to and quieted in possession of the Canal Gravier and Basin, and also a square of ground called Place Gravier; situated in Poydras street near

and at its junction with Baronne street, in the city of New Orleans. EASTERN DIS.
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The defendants set up claim to the premises in the following resolution adopted in council the 31st of July, 1838 :

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"Whereas the New Orleans and Carrollton Rail Road and Banking company have in violation of the law and the rights of the public, continued to inclose the property known as the site of Gravier's Canal : *Be it therefore resolved*, that the said company be and they are hereby required to remove or cause to be removed all fences and barriers erected by them, or by persons in their employ, around any portion of said grounds, being in the centre of the continuation of Poydras street, below the Poydras market, within ten days, under the penalty of \$25 per day, from the expiration of that time until the said fences or barriers be removed : such fine or fines to be recoverable before any court of competent jurisdiction for the benefit of this Municipality."

On the 17th day of May, 1838, previously to the above, the council of the 2d Municipality adopted the following resolution :

"Resolved, that the Carrollton Rail Road and Banking company be and they are hereby required to remove within ten days, the fence said company have erected around a portion of ground in the centre of Poydras street, originally destined for a canal ; said company having no right to change the destination of said ground, nor to enclose the same, without the consent of all parties concerned, and of this council ; and if said fence be not removed within ten days, said company shall be liable to a fine of ten dollars per day until it is removed."

The plaintiffs pray that the Municipality be perpetually enjoined from proceeding in any way to carry said ordinances or resolutions into effect, or otherwise disturbing the title and possession of the plaintiffs ; and that said resolutions or ordinances be annulled and declared void. The defendants denied that the plaintiffs were the owners of the premises in dispute, and

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claimed the exclusive use and administration of them as dedicated to public use, as public places.

In September, 1838, the council of the 2d Municipality passed another resolution to the following effect :

“ Resolved, that the attorney of this Municipality be and is hereby authorized and required to take such legal steps as may be necessary in order to obtain a legal decision vesting in the public the right of use to all that portion of ground, known as Gravier's Canal and Basin,” &c.

The plaintiffs subsequently instituted another suit alleging the defendants slandered their title to three several pieces of property, including two small squares of ground and the Canal Gravier. They pray that the defendants be required to exhibit any title they have and to be forever enjoined from setting up or claiming title thereto.

The defendants set up claim to the premises as public places, dedicated to public uses in the original and subsequent plans of the faubourg St. Mary, as originally laid out and recognized by B. & J. Gravier, &c.

Upon the issue, thus made up, and the testimony, consisting of plans, titles, &c., the case was submitted to the court. There was judgment for the plaintiffs, declaring them to be the true owners of Gravier's Canal and Gravier's Basin; and that the *Place Gravier*, or Gravier Square, be adjudged to be public property under the administration of the 2d Municipality; and that the latter pay costs. Both parties joined in the appeal to this court.

L. Javin & Thos. Slidell, for the plaintiffs.

Carter & Eustis, for the defendants.

Garland, J. delivered the opinion of the court.

The plaintiffs allege they are the lawful owners and proprietors and are now in possession of all that portion or space of ground in the faubourg St. Mary, known by the name of the site

of the Canal Gravier, as will be more fully shown by reference to a plan annexed. They say that the council of the Municipality No. 2, in violation of their rights and assuming legislative authority not embraced by their charter, have passed two ordinances requiring the plaintiffs under heavy penalties to tear down and remove certain enclosures which they have made around a piece of ground in Poydras street, which was a part of the site of said Canal Gravier. That these resolutions are illegal, oppressive and in violation of long known rights, which have on various occasions been recognized and admitted by the former corporation of New Orleans and the present defendants. Wherefore they pray an injunction may issue for the protection of their rights, and the Municipality enjoined from proceeding in any manner to carry these ordinances into effect, or otherwise disturbing their title and possession, and that said ordinances be declared null and void.

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An injunction was granted, the defendants cited and for answer say:

1. They deny the ownership of the plaintiffs to the piece of land described in the petition.

2. They deny possession or interest in the plaintiffs; and aver that the space is a public street or place of which the public has the use, and that neither the plaintiffs or any other person can have any ownership, property or possession of the same.

3. The pretended possession of the plaintiffs is a disturbance of the public right to the use, the place having ever since the establishment of the faubourg been subject to a right in the public of way and view.

4. That by the ancient plans of the faubourg St. Mary, the space in question was dedicated as a public street and has always been used as such.

5. That the original proprietors of the faubourg sold the lots with reference to the right of view and way on said space, and among the ancient plans they particularly rely on that made by Carlos Trudeau, the 1st April, 1788, that made by the same person on the 14th of May, 1796, and on that made by Jean

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Gravier on the 5th of June, 1805, by which he illegally attempted to encroach upon said space, also on the plan made by the city surveyor in the year 1809.

6. That by the plan of 1809, the previous plan of Gravier, which had never been accepted by any competent authority, was repudiated and the ancient limits of the street restored, which plan was deposited in the archives; as also a plan of the 24th of April in the year 1788.

7. They say, by law the council has the right of regulating by ordinance the use of the streets, and that the ordinances in question are legal. They further deny every thing not expressly admitted.

The answer concludes by praying a dissolution of the injunction; that it be decreed said place belongs to the public, with all its services and uses; that the plaintiffs be forever enjoined from interrupting the possession and use of it, and that they (the defendants,) be authorized to exercise all rightful acts of legislation and police over it.

Sometime after the filing of this answer the plaintiffs filed a supplemental petition in which they set forth their title to the ground in question stating the various mesne conveyances by which it was derived from Bertrand Gravier, alleging the defendants had slandered their title, threatened them with a suit, and did other acts calculated to injure them and reduce the value of their property. They also alleged various ratifications and recognitions of their title by the old corporation of New Orleans and the present defendants. They pray the defendants may be compelled to exhibit their title, if any they have, that it be rejected and they quieted in their possession. To this the defendants answered, setting up the rights of the public and the various plans of the faubourg, which they say show a dedication to public use as a public highway or open space. Thus the action was changed from the possessory character which it at first presented, to a petitory form.

On the trial the plaintiffs presented a regular chain of title from Bertrand Gravier, through Jean Gravier and the Orleans

Navigation company to themselves, all of which acts have been ratified by the curator and heirs of Jean Gravier deceased.

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Junc, 1841.*

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The defendants for the purpose of showing that the place in question has been dedicated to public use, offer in evidence a figurative plan of a portion of the faubourg St. Mary, drawn by Laveau Trudeau, dated the 1st of April in the year 1788, which represents the levee, and Magazine, Camp and St. Charles streets only, with a single range of lots on the west side of the latter, and Gravier, Poydras, Gired, Julia, and St. Joseph streets, with the exception of the former, running nearly at right angles. Trudeau, in his explanation of this plan, says it has three cross streets with four perpendicular and one oblique, ("*trois rues de traversée avec quatre rues perpendiculaires et une oblique.*") The introduction of this plan as evidence was objected to by the plaintiffs, on the ground it was never recognized by either Bertrand or Jean Gravier, signed by them, or accepted by the Spanish authorities or the City Council, nor does Trudeau sign it as a public officer. These are questions of much importance not only in this case but to the public and though it is not very necessary to decide them in this case, yet it is as well to say, there is no other plan of the faubourg known before this. Bertrand Gravier certainly submitted some plan to the Spanish governor, according to the evidence. This went into the archives of the city council as early as 1804, as the plan of that part of the faubourg, and both Bertrand and Jean Gravier sold lots in conformity to it. We think it is now too late for a party claiming under those persons to object to it. It appears from the records of the council to have been received by them as such, and we think it properly admitted in evidence to prove the boundaries of the lots and the direction of the streets, so far as it extends. But it includes no part of the premises in dispute.

Ancient plans of a city are admissible in evidence to prove the boundaries of lots sold in reference thereto, and the direction of streets so far as they may extend, although not including the *locus in quo*; and when one of the parties claims under those who caused the plans to be made.

The plan No. 2, offered by the defendants, purports to be a copy on a reduced scale of that of the 1st of April, 1788. When it is carefully examined it is evident it is a correction of two plans, one made on the 24th of April, 1788, and the other

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the 14th of May, 1796, but when corrected is not known, though probably in 1804, when Trudeau was called on for a plan of the faubourg. The first statement is that it is a plan on a reduced scale of the previous one which is represented on it, by the letter A placed at four different points. The streets on the original plan are named on this in the explanation but no additional streets are named in it. In the note dated May 14th, 1796, it is said Carondelet, Baronne, and Philippa and Perdido streets, were projected or added with a square or plaza, and in another note it is said the copies of these plans were given to B. Gravier, one for himself and the other for Mr. Sarpy, as purchaser of a portion of the lots which figure in the copies. This explains the reason of this last plan being made or projected. Sarpy had contracted or was about contracting for the purchase of some lots, and the plan was made at the request of one or both, to enable them to complete the purchase. There is no evidence in the record the sale ever was completed, so the original *projet* remained in the possession of Trudeau, and the copies in the possession of Gravier, or he and Sarpy, until Trudeau in 1804 sent them to the city council in a corrected form. There is not the least evidence that the public authorities ever saw the reduced plan or that of 1796, until the period mentioned, and in the meantime, it is clear from copies of sales that Bertrand or Jean Gravier, probably the latter, had changed his mind as to the plan of that part of the city, which he had a right to do, as no lots were sold in conformity to the plan of 1796, nor is there any evidence of any acceptance or use by the public of the streets that had been projected.

The defendants next offer a plan made by Jean Gravier, at what precise period is not known, but we find it referred to in sales as early as 1802 and 1804, and deposited in a notary's office annexed to an authentic act on the 5th June, 1805, on which Poydras street is represented as one hundred and ten feet wide, instead of seventy, with a space in the centre, for a canal, forty feet in width, and at the point where Baronne

street would have intersected it on the north side, we find a piece of ground one hundred and eighty feet square, called a *Basin*, and north of that a parallelogram called *Place Gravier*. This plan the defendants offer, to prove a change in the original one, which they complain of, and yet wish to take advantage of it. They and their predecessors say Gravier originally made Poydras street seventy feet wide and dedicated it to public use; that he afterwards added forty feet to it against their wishes and positive orders, but as he has done so, they now allege he intended to give it to them together with the *Place Gravier*: all the other plans and acts of sale offered by the defendants go to show that Jean Gravier always acted on this plan, and when, at a much later period, he made another plan extending the faubourg from Philippa to St. Paul street, the canal is represented as being in the centre of Poydras street. This latter plan, it is not denied, the old corporation of New Orleans accepted; at least, there is no evidence they ever repudiated it. If they have not accepted it, no other plan of that part of the city is shown to exist, and very little support to the defence is obtained from it.

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The resolutions of the city council of the 2nd of June, and the 25th of August, 1804, show clearly that there was no plan in the archives of the faubourg St. Mary, as they call upon Trudeau to furnish one, which he did, but there is nothing to show Gravier knew any thing of this call, or approved of what Mr. Trudeau did. On the contrary, it is known that previous to these dates he was selling lots by the plan produced, and filed by him in June, 1805. In May, 1806, the council ordered another plan to be made to determine the width of the streets, which does not appear to have been executed.

From this latter period to March, 1809, the city council were silent, but on a representation made at that time by the city surveyor, that Jean Gravier was making various encroachments in the faubourg, which are indicated by marks on a plan which the surveyor submits; the mayor was authorized and directed to sue Gravier, to arrest him in his encroachments and

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in future to maintain the integrity of the primitive plan of the faubourg. The encroachments or *empiétemens* indicated, are at various places. On the levee near the faubourg Delord, on Lafayette square, in Baronne street below Gravier, at or near the intersection of Baronne and Poydras streets, and other places, but nothing is said as to the spot in dispute. Nothing appears to have been done under this resolution until the year 1818, when a suit was commenced against Jean Gravier to compel the removal of certain buildings and works which he had erected on Lafayette square. A reasonable inference to be drawn from the continued silence and inaction of the corporate authorities, is, that Gravier desisted from the encroachments which were unauthorized, and they did not disturb his basin and canal, because they supposed he had a right to make and use them.

Where a canal and basin figures on the original plan of a city, but are always used and sold by the proprietors, they will be considered as private property.

All the evidence, both for plaintiffs and defendants, shows that Jean Gravier always considered the basin and canal as his own. He used them; he contracted with Goodwin and others to enlarge and deepen the canal; he always asserted and maintained his possession until 1825, when the property was seized and sold under execution to Gordon, who purchased for the Orleans Navigation Company. They remained in undisturbed possession until 1833, when a sale was made to the plaintiffs. Immediately after the sale the old corporation of the city recognized the rights of the Rail Road Company, by receiving from them a grant of two pieces of ground, for the purpose of prolonging Baronne and Poydras streets, in consideration of which, they gave the company the use during the existence of their charter of a portion of the Place Gravier, to be used as turn-outs for their road, a shelter or depot for their cars, and other purposes specified in the deed. In July, 1836, the defendants recognized the interest and right of the plaintiffs by a resolution calling on them to fill up the canal, and in the month of September, in the same year, actually purchased from them all the space between Baronne and Circus streets, and have built a market house on it, which was one of the

conditions of the sale. But almost as soon as the sale was completed and the mandate obeyed, the municipal authorities turn about and gravely say there is a mistake in all that has been said or done. That plaintiffs have no title and they have one, notwithstanding the plaintiffs have always been in possession and the defendants have protested heretofore that the common grantor had no right to change a plan by which this space is given to us. The conviction of error on the part of the municipality, is rather too sudden to operate in a like manner on minds not interested in the question, and we can find no argument to sustain it in the face of their own acts.

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What constitutes a dedication to public use, has been so much discussed in this court lately, as not to need repetition now. There must be a plain and positive intention to give and one equally plain to accept. The form is not material. We see nothing in the evidence to prove a dedication of the basin and canal; on the contrary such a purpose was always repudiated by Jean Gravier. Upon that point we see but little difference between this case and that of *Livaudais vs. the 2nd Municipality*; 16 La. Rep., 509. If any dedication was ever intended it remained inchoate, until some evidence of acceptance was exhibited. None has been shown. The defendants or the public never used the basin or canal in any manner, and it was in fact not susceptible of use, except by Gravier and his agents or lessees, who used it to transport wood from the swamp and to supply clay for making bricks. As the defendants have failed to prove a dedication, they have no legal title to the premises in question.

In order to dedicate property to public uses, there must be a plain and positive intention to give and one equally plain to accept. The form is not material.

The plaintiffs complain of the judgment of the Parish Court, because the judge declines deciding to what uses they should apply the canal and basin, and ask us to amend the judgment in that particular. This request we must decline as we do not think it proper to give such an opinion in the present state of the case. The plaintiffs have a regular title from Jean Gravier and are vested with all his rights, as to the manner they may

EASTERN DIS. choose to exercise them we will not express an opinion in
June, 1841. advance.

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The judgment of the Parish Court is therefore affirmed in all respects, except that the plaintiffs shall, during the existence of their charter, have the use of that portion of the *Place Gravier* set forth in the contract made with Dennis Prieur, Mayor of the city of New Orleans, on the 18th day of the month of July, in the year 1833. The defendants to pay the costs of this appeal.

SHIELDS ET AL. vs. PAUL.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

The endorser has a right to recover the damages which he has paid on a protested bill of exchange, from the acceptors, through whose fault his liability as endorser had attached.

The gratuitous refunding by the holders, to an endorser, damages on a protested bill paid by him, confers no right on the acceptors to recover them from him, although they had also paid or refunded to him on judgment rendered.

This is an action to recover the sum of \$417 17, the amount of damages on a protested bill of exchange, accepted by them and paid by the defendant as endorser, but which they subsequently paid and refunded to him. They allege he has received the amount of damages on said bill twice; the same having been refunded to him by the Bank of Mobile, the holder of said bill. They pray judgment, that the said damages be paid over to them.

The defendant pleaded the general issue; and denied specially that he was liable to refund the money demanded. He

admitted the transactions which led to the refunding the damages on the protested bill in question, but averred the plaintiffs had no right to hold him liable to them.

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There was judgment for the plaintiffs and the defendant appealed.

C. M. Jones, for the plaintiffs.

Barton, contra.

Bullard, J. delivered the opinion of the court.

The defendant, James Paul, being the endorser of a bill of exchange, drawn upon Shields, Turner & Renshaw, by whom it was accepted, which bill had been negotiated to the Bank of Mobile, paid the same after protest for non-payment, together with costs, interest and ten per cent. damages, according to the law of Alabama. He thereupon sued the said acceptors and recovered the amount of the bill together with the damages which he proved he had paid to the Bank. That judgment was afterwards satisfied. The Bank of Mobile subsequently refunded to Paul the damages he had paid upon the protested bill, and the present action is brought by the acceptors to recover back said amount of damages; they alleging that the said damages were remitted in pursuance of an act of the legislature of the State of Alabama, giving to certain banks time to resume specie payments, upon certain conditions. The defendant is appellant from a judgment which condemned him to refund the amount of damages thus received by him in pursuance of his judgment against the acceptors.

We are of opinion the court erred. It is clear that Paul, having himself paid the damages on the protested bill, had a right to recover them from the acceptors, through whose fault the liability of the endorser had attached. There was therefore no error in the judgment, which would authorize the plaintiffs to claim a restitution of the amount upon the principles of the *condictio indebite*. The only inquiry therefore is, whether the subsequent refunding of the damages to Paul by the Bank

The endorser has a right to recover the damages which he has paid on a protested bill of exchange, from the acceptors, through whose fault his liability as endorser had attached.

EASTERN DIS. of Mobile created any legal obligation on the part of Paul to
June, 1841. make restitution to the present plaintiffs.

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The act of the legislature of Alabama "to extend the time of indebtedness of the Bank of the State of Alabama, &c." which appears to be relied on by the plaintiffs, in their petition, authorizes the State Bank of Alabama and its branches, and even compels them to refund damages on protested bills of exchange to those by whom they had been paid. So far as it relates to the State Bank and its branches, such restitution or remission as the case might be, may be regarded under that statute as one of the conditions upon which the suspension of specie payments was tolerated for a limited period. But nothing shows that the Bank of Mobile was under any such legal obligation to remit or restore the damages on protested bills. The ninth section of that act relates exclusively to the State Bank; (acts of 1837, page 9.) Whatever may have induced the Bank of Mobile to restore the amount in this case, whether it was the punctuality of the endorser, or a desire to be as liberal as the State Bank, or that it became ashamed of exacting the pound of flesh from its delinquent debtors, while it was paying its own engagements only in new and perhaps illusory promises to pay, in constant violation of its charter, there is no evidence in the record to show that any favor was intended to be conferred upon the present plaintiffs. So far as it appears, we must regard the act of the bank as one of pure liberality out of personal consideration for the defendant, and conferring no legal rights upon the plaintiffs in this case.

The gratuitous refunding by the holders, to an endorser, damages on a protested bill paid by him, confers no right on the acceptors to recover them from him, although they had also paid or refunded to him on judgment rendered.

It is therefore ordered and adjudged that the judgment of the District Court, be reversed, and ours is for the defendant with costs in both courts.

KOLLIGS, BROTHERS *vs.* MEEKS.

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June, 1841.

APPEAL FROM THE CITY COURT OF NEW ORLEANS.

KOLLIGS,
BROTHERS
vs.
MEEKS.

Judgment affirmed with the maximum of damages, for a frivolous appeal.

This is an action against the maker of a promissory note, duly protested, and to which no defence was set up. Judgment by default was made final against the defendant and he appealed.

Bradford, for plaintiffs, *ex parte*, prayed the affirmance of the judgment with ten per cent. damages.

Simon, J. delivered the opinion of the court.

This is a suit against the drawer of a promissory note of hand, duly protested for non-payment. The defendant was regularly cited, but did not appear, and a judgment by default having been duly entered against him, the same was made final according to law, from which judgment, said defendant appealed.

No defence was set up in the court below against plaintiff's demand; no motion for a new trial was made, and no error having been assigned as apparent on the face of the record, nothing has been shown in this court in support of the appeal. The plaintiffs and appellees have prayed for the affirmance of the judgment with damages as for a frivolous appeal, and we think they are entitled to the *maximum*.

It is therefore ordered, adjudged and decreed that the judgment of the City Court be affirmed with costs and with ten per cent. damages.

CASES IN THE SUPREME COURT

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June, 1841.

GASQUET vs. OAKLEY.

GASQUET
 vs.
 OAKLEY.

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF NEW
 ORLEANS.

The surety who has paid defendant's notes in the hands of a third person, without notice of the defence set up, will recover the amount he has paid, notwithstanding the eviction and loss of title to the property for which they were given.

This is an action against the defendant as maker of one, and endorser of another note, given as part of the price of land. The plaintiff became bound with the defendant; paid and took up these notes, and now seeks to recover the amount of them from the latter.

The defendant pleaded the general issue, and set up a failure of title, and danger of eviction from the property for which the notes were given, &c.

There was judgment against him, and he appealed.

Wharton, for the plaintiff.

Oakey, in person, &c.

Morphy, J. delivered the opinion of the court.

The plaintiff seeks to recover the amount of two promissory notes, one drawn to his order by defendant, and the other drawn by G. Green to the order of defendant, and by him endorsed over to the plaintiff. The defence set up is, that the notes sued on were given in payment of a tract of land purchased from Levi Pierce by defendant jointly with the plaintiff, Green & Currell. That prior to the institution of this suit, an action of slander of title had been brought by defendant and his co-purchasers against John McDonogh, who publicly claimed the land as his own, and pretended to have a better title to the same than the defendant and his co-owners; and moreover, that J. McDonogh is in possession of the property they sold to them. Even admitting that this defence could have availed the defendant, in a suit brought against him by his vendor, it

cannot be set up against the plaintiff, who as surety has paid the debt in the hands of third persons, without notice of the pretended danger of eviction and want of possession; and against whom the defendant could not have opposed these matters, to withhold or suspend payment.

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June, 1841.

ROLLAND'S
HEIRS
vs.
McCARTY.

The judgment of the Parish Court is therefore affirmed with costs.

ROLLAND'S HEIRS vs. McCARTY.*

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

The court will not presume, that parties make use of words in their contracts to which no meaning is attached by them. Some effect is to be given to every word if possible; and but rarely will the court reject words or phrases in a contract as surplusage.

Where the act of sale of a lot conveys the object without any exception or reservation, together with "the privileges, rights and pretensions which belong to it; and if the *extent* be greater than is mentioned, it shall be for the advantage of the purchaser," every thing, and all accretions, present and future, pass thereby.

The plaintiffs allege, their ancestor J. B. Rolland was the owner, at his death in 1814, of a large square of ground fronting on Tchoupitoulas street, and extending from the opposite side to the water's edge of the river Mississippi, in New Orleans. That at the probate sale of his succession in 1817, the defendant became the purchaser of a part of this square, which their ancestor had purchased from Marie Josephine Deslondes, wife of Bertrand Gravier, in 1788; having 60 feet front on Tchoupitoulas street, by the depth of 160; bounded on one side by

* JUDGE MORPHY did not sit in this case, having been of counsel for defendant.

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M. Jourdan, and on the other by Saturnine Bruneau, and which was sold with fixed limits and bounds. That the defendant has taken possession of 80 feet front on the opposite side of the street, and of his original quantity, and extending back to New Levee street, which is opened on the batture, formed since the first sale to their ancestor in 1788. The plaintiffs claim all the batture, that has formed since said sale as accruing to them; the defendant having only purchased a certain quantity fronting on Tchoupitoulas street, which was at that time the front street on the levee and river. They pray judgment for the said lot, having 80 feet front on Tchoupitoulas street, French measure, and running back between parallel lines to New Levee street.

The defendant pleaded the general issue; set up title to the property claimed, as derived from the sale from plaintiffs' ancestor to him, and confirmed by a transaction or compromise made with B. Gravier's heirs, E. Livingston, and the corporation, in 1820. He further pleads prescription, &c.

The case has turned principally on the construction of the contracts of sale or transfers of the property in dispute to, and from the ancestor of the plaintiffs, which are fully recited and stated in the opinion of this court.

There was judgment in favor of the defendant, and the plaintiffs appealed.

Preston, for the plaintiffs and appellants.

Roselius, for defendant and appellee.

Bullard, J. delivered the opinion of the court.

The heirs of J. B. Rolland allege in their petition, that their ancestor, in September, 1788, purchased from the wife of Bertrand Gravier, a lot having ninety feet front on the levee of the river, by one hundred and sixty feet depth, bounded at that time on one side by lands of the vendor, and on the other by land of Raphael Ramos, and situated without the incorporated limits of the city of New Orleans. That said lot belonged to

a rural estate, the sale of which conveyed to the purchaser the right of alluvion ; there being no reservation in the act of sale. They further allege, that in point of fact the land sold to their ancestor greatly increased by alluvion after the sale, and in 1817 had extended so far in front, that the part outside of the road and levee was not only susceptible of ownership and alienation, separate from the original tract, but was far more valuable than said tract, and not an accessory to the land originally purchased ; but on the contrary as separate property and could not be alienated without the express intention and consent of the owners. The petitioners proceed to allege, that the land thus purchased, descended to them on the death of their ancestors, as well as the alluvion in front of said lot, then forming a part of the batture of the faubourg St. Mary ; and that in pursuance of certain proceedings in the Court of Probates of the Parish and City of New Orleans, they sold on the 17th November, 1817, by act before Michel de Armas, to Louis B. McCarty, a part of the land purchased by their ancestors having sixty feet front on Tchoupitoulas street, by one hundred and sixty feet in depth, which they allege to have sold as a city lot, with fixed limits and boundaries, but that they by no means sold or intended to sell any part of their property outside of the levee. They allege, that they are the proprietors of a lot of sixty feet front on Tchoupitoulas street, and extending in depth between parallel lines to the Mississippi, and that L. B. McCarty has taken possession of thirty feet front, French measure, of said land, and claims the same as owner, and refuses to deliver the same to the petitioners. They pray judgment for the lot thus described.

The defendant first answers by a general denial. He further says, that the ancestor of the plaintiffs never had any title to the lot in question and never pretended to have, and that all the plaintiffs' pretensions or supposed rights to the batture in 1817, and all rights whatever belonging to them were intended to be transferred, and are in reality transferred to the defendant without any reservation whatever. The defendant further

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answers, that he owns only that portion between Commerce and Levee streets, and that his title is derived from the heirs of B. Gravier, by virtue of a compromise entered into between the defendant and the said heirs. The defendant further pleads prescription and claims the value of his improvements which he avers amount to twenty thousand dollars.

The description of the lot sold by Gravier and his wife to Rolland, is as follows: "Un terreno proprio à mi &c. compuesto de noventa pies de frente y ciento y sesenta de fondo estando fuera de esta ciudad y haciendo frente à la levée de este Rio, lui dando por un lado con tierras de Rafael Ramos y por el otro con tierras de nos los vendedores, cuyo terreno hemos hecho medir por Don Carlos Laveau Trudeau, agrémensor publico, quien puso los mayores en sus respectivos lugares."

It appears, that sixty feet out of ninety of this lot was sold in 1817 by the heirs of Rolland to the present defendant. In the act of sale they described it "as a lot of sixty feet front à la levée, between Poydras and Girod streets, faubourg St. Mary, by one hundred and sixty feet depth, bounded on one side by Jourdan, and on the other by Saturnine Bruneau, &c.," and another lot of thirty feet on Magazine street, by a depth of one hundred and sixty, which two lots, they go on to say, "vendus tels qu'ils se poursuivent et comportent sans en rien excepter ni réserver, ensemble les privilèges, droits et prétentions, qui peuvent leur correspondre et même si leur contenance est plus grande que celle ci-dessus mentionnée, ce sera à l'avantage du sieur acquéreur."

These terms of conveyance are very broad and comprehensive, and if the plaintiffs claim the batture lot in dispute, as forming an accessory to, or, more properly, a part of the original lot, and formed subsequently to 1788 by alluvion, it is worthy of serious consideration, whether it did not pass to the present defendant by the sale of 1817 above recited.

The title set up by the defendant as derived from the heirs of Gravier, results from a compromise or transaction between the parties. Heirs of Gravier having come to a partition with

Edward Livingston of the batture in front of the faubourg St. Mary, and the lot in question falling within the part assigned to the former, and the present defendant having brought suit for the same as his property, the parties entered into the transaction in question, which recites, that there exists in front of the lot (*devant l'emplacement*) situated in the faubourg St. Mary between Poydras and Girod streets, and measuring sixty feet front on Tchoupitoulas street, bounded on one side by Jordan and on the other by Bruneau, and of which the said Louis Bartholemey McCarty is the owner by virtue of the acquisition made of the heirs of the late J. B. Rolland, a batture between the Tchoupitoulas street and the margin of the waters of the river, and following as far as the river the lateral lines of said lot; to which batture the said parties pretend respectively to have rights, to wit: the heirs of Gravier, as well in that quality as in virtue of the partition entered into between them and Livingston, and the said McCarty as front proprietor as above set forth; and that in consequence of these pretensions the said McCarty had instituted a suit praying to be declared and decreed proprietor of said batture lot. Now the parties, in this situation of things, desirous of terminating amicably this contestation enter into a transaction or compromise in the following manner. They divide the lot into two equal halves of thirty feet front each, the dividing line running down to the water's edge. The heirs of Gravier cede, transfer and abandon to McCarty all their rights of property to one-half of said batture, to be taken on the side of Poydras street; that is to say below, and as far as the marginal line of the waters, and the said McCarty cedes and abandons all his rights and pretensions to the other half.

The plaintiffs argue that in 1788, previously to the sale by Madame Gravier to their ancestor, no batture existed in front of the lot which formed the object of that sale susceptible of private ownership, but that he became a front proprietor, the lot being bounded in effect by the river, and that he and his heirs became consequently owners of the batture lot which

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EASTERN DIS. subsequently was formed in front of it and was incorporated
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with and became a part of it. That their sale of the front lot in 1817, to the present defendant did not embrace the batture lot which had already been formed and had become susceptible of individual appropriation, use and ownership. They therefore, as they contend, remained owners of the lot in dispute, as an accession to the one originally purchased of their ancestors, and the present defendant in the transaction with the heirs of Gravier falsely assumed to be the owner under his purchase from the plaintiffs, and having obtained a title from the heirs of Gravier, which was merely recognitive of their title, the same ought to accrue to their benefit and vest in them.

It is true that the defendant, both in his action against Livingston et al. and in the subsequent act of compromise or transaction with the heirs of Gravier, assumed the quality of assignee or *ayant cause* of the heirs of Rolland. It was as owner of the front lot under his purchase from these heirs that he claimed the batture, at that time it would appear, indefinite in extent and not yet appropriated to individual use, but forming a part of the unreclaimed alluvial formation in front of that part of the faubourg St. Mary.

There are cases, undoubtedly, in which persons obtaining a title to lands under the false pretext of standing in the right of another, having an inchoate right, as in cases of pre-emption for example, might be compelled to convey, or their title thus fraudulently obtained be declared to enure to the benefit of the equitable owner. But how do the parties stand in relation to each other in the present case? This leads us to enquire into the construction of the contract between the heirs of Rolland and the present defendant, and whether in fact the heirs after that sale retained any title to the premises in dispute.

If the plaintiffs have any title whatever to the lot in controversy it must be in consequence of the purchase of their ancestor, and because the same did not exist at that period but had insensibly grown and attached itself to the lot originally purchased, previously to their sale to the defendant. It must,

therefore, in 1817 have formed a part of the original lot, an enlargement of it by accretion. Now we are not to presume that parties make use of words in their contracts to which they attach no sort of meaning. Some effect is to be given to every word, if possible, or rather we are rarely authorized to reject words or phrases as surplusage. Now the plaintiffs in their act of sale to the defendant sell the lots, such as they are, without any exception or reservation, together with the privileges, rights and *pretensions which belong to them; and even if their extent should be greater than that above mentioned, it shall be for the advantage of the purchaser.* These expressions appear to us wholly irreconcilable with the idea that any part of the property originally acquired by their ancestor was retained or reserved by the heirs, if in the meantime the lot had increased by alluvion. It is difficult to imagine to what else the parties alluded, unless it was to the possibility, that the owner of the lot on Tchoupitoulas street might be entitled to the increase, which was then growing on the outside of the levee as an appurtenance to the original lot, or rather as an integral part of it. If so, it certainly passed by that conveyance to the defendant. This view of the case is strengthened by the fact that the lot now in controversy is not shown to have been separately inventoried as a part of the estate of Rolland, nor offered for sale as such. Under this view of the case it becomes useless to enquire whether the batture existed at the time of the sale to Rolland in 1788 or was formed subsequently. If it existed previously and had become susceptible of private ownership, then, it never belonged to Rolland or his heirs. If it was formed afterwards, the latter could claim it only as a part of the original lot, and in that case it passed, in our opinion, by their conveyance to the defendant.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs.

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The court will not presume that parties make use of words in their contracts to which no meaning is attached by them. Some effect is to be given to every word if possible; and but rarely will the court reject words or phrases in a contract as surplusage.

Where the act of sale of a lot conveys the object without any exception or reservation, together with "the privileges, rights and pretensions which belong to it; and if the *extent* be greater than is mentioned it shall be for the advantage of the purchaser," every thing, and all accretions, present and future, pass thereby.

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MORGAN DORSEY & CO. *vs.* THEIR CREDITORS.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

MORGAN
DORSEY & CO.
vs.
THEIR
CREDITORS.

A judgment which has become definitive, cannot be set aside by *consent of parties*, especially when all the parties interested are not present; nor can an attorney deprive his client of the benefit of his judgment without a special power to do so.

A judgment homologating a tableau of distribution, is a judgment in favor of each creditor to whom a dividend is assigned; and has the effect of *res judicata* in relation to the proceeds or money in the hands of the syndic.

This case comes up on a rule taken by Wm. M. Duncan & Sons, who claim to be creditors of the insolvents, on the syndic requiring him to pay them their equal share of the funds, *pro-rata* with the other ordinary creditors who have been paid. The rule is predicated on a judgment, entered up by *consent of counsel*, setting aside another definitive judgment, and recognizing them as creditors for the amount of their claim. The rule was discharged, and they appealed.

Hennen, for the appellants.

Eustis, for the syndic.

Simon, J. delivered the opinion of the court.

This is an appeal from a judgment discharging a rule taken by W. M. Duncan & Sons, on the syndics of the creditors of the insolvents to show cause why they should not be paid the amount of the dividend coming to them, in the same proportion as the other chirographary creditors have been paid, on the sum of \$25,238 59, for which they had been placed on the tableau of distribution, and for which they obtained a judgment in this case on the 26th of April, 1832.

The record shows that on the seventh of June, 1827, a tableau of distribution was filed by the syndics of the insolvents, and that W. M. Duncan & Sons were placed thereon as ordinary creditors for the above mentioned sum; that said tableau was opposed by several creditors, namely, by F. Depau and Samuel Hicks; that by a judgment rendered on the first

of May, 1830, the oppositions of Depau and Hicks were sustained and that Duncan & Sons were stricken off said tableau of distribution as creditors. This judgment does not appear to have ever been appealed from.

On the 26th of April, 1832, on motion of the assignees of W. M. Duncan & Sons, and on the written consent of Samuel Livermore, for F. Depau, the judgment rendered on the oppositions of Depau and Hicks was set aside and annulled; it was ordered that the assignees of Duncan & Sons be placed on the tableau of distribution for the aforesaid amount, and nothing was done on this order until the rule in question was taken. This last rule is now opposed by the syndic for the mass of creditors interested in the tableau.

We think the judge *a quo* did not err: It is perfectly clear that the judgment obtained on the first of May, 1830, though rendered on the oppositions of only two of the insolvents' creditors, settled the rights of all the persons concerned in the tableau of distribution, that it enured to the benefit of all the creditors and became the property of the mass, unless regularly annulled, rescinded or corrected within the time and in one of the modes prescribed by law; *C. of Pr. arts.* 548, 556, 564 & 610. No appeal was ever taken from said judgment, no action of nullity was ever brought against it, and one year after its rendition, it had acquired the force of *res judicata*. If so, how could the effect of such a judgment be destroyed by the mere consent of the attorney of one of the creditors? Samuel Livermore, as attorney at law of F. Depau, had even no power, unless specially authorized to do so, to deprive his client of the benefit of his judgment; he had no right to dispose of his client's property, the judgment formed *res judicata* in his favor as to the claim in question; no one but himself could validly renounce to it; and surely, it cannot be pretended that the other creditors of the insolvents, the extent of whose rights had also been liquidated and determined by the same judgment, can in any manner be bound or prejudiced by the subsequent proceedings had with the consent of an attorney

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A judgment which has become definitive, cannot be set aside by consent of parties, especially when all the parties interested are not present; nor can an attorney deprive his client of the benefit of his judgment without a special power to do so.

EASTERN DIS. who had no power to bind his client. In the case of *Morgan*
June, 1841. & *Co. vs. their creditors*, 4 *La. Rep.* 173, this court held that

BEACH & CO. "the judgment of homologation on the tableau of distribution
 vs. filed by the syndics, is, in law, a judgment in favor of each
 WAGNER ET AL. creditor to whom a dividend is assigned; and has, in relation
 A judgment homologating a tableau of distribution, is a the thing judged." Under this principle of law, which, in our
 judgment in favor of each creditor to whom a dividend is assigned; and has the effect of *res judicata* in relation to the proceeds or money in the hands of the syndic.

to the proceeds in the hands of the syndics, the authority of the thing judged." Under this principle of law, which, in our opinion, cannot be controverted, it is clear that the judgment rendered on the 26th of April, 1832, and which is now the basis of the rule under consideration, was a direct violation of the rights acquired by the creditors under the judgment concerning the mass, that the tableau of distribution had become definitive, and could not be altered or amended; and we must therefore consider the order annulling the previous judgment on the oppositions, as being in itself a mere nullity.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed with costs.

BEACH & CO. vs. WAGNER ET AL.

APPEAL FROM THE COMMERCIAL COURT OF NEW ORLEANS.

Judgment affirmed; the record being imperfect, so as to preclude an examination of the case on the merits.

Signatures to the notes and checks sued on, are admitted by the plea of the general issue.

This is an action on three checks and a promissory note. The defendants pleaded the general issue; denied specially any liability and set up a special defence. There was judgment for the amount claimed and the defendants appealed. The clerk's certificate, states the record contains "a transcript

of all the proceedings, as well as of all the documents filed in the cause, &c." It does not certify that the record contains all the evidence adduced, &c.

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Benjamin, for plaintiffs, prayed the affirmance of the judgment; and urged that the appeal was frivolous and vexatious and should be punished with ten per cent. damages.

M Henry, contra.

Simon, J. delivered the opinion of the court.

Two of the defendants are appellants from a judgment rendered against them for the amount of three checks and a promissory note on which they were sued.

They have brought up a record in which there is neither bill of exceptions nor statement of facts, and the certificates of the judge and clerk show that none but the documentary evidence is therein contained.

The defence set up consists in the general issue and a special denial of the defendants' liability to pay the amount sued for, and this must be considered as an admission of their signatures as drawers of the checks and note, which were all duly protested for non-payment.

We think this appeal is clearly frivolous, and the defendants should have been mulcted in the maximum of the damages allowed by law, if it had been prayed for by the plaintiffs.

It is therefore ordered, adjudged and decreed that the judgment of the Commercial Court be affirmed with costs.

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June, 1841.

AUSTIN ET AL. vs. LATHAM.

APPEAL FROM THE COMMERCIAL COURT OF NEW ORLEANS.

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vs.
LATHAM.

Where the attorney at law makes the affidavit for an attachment, he need not state that he is attorney in fact.

If the pleadings state the non-residence of the plaintiffs, their absence, and right of their attorney to make affidavit for them, will be presumed, when the contrary is not alleged or shown.

The surety in an attachment bond need not be owner of real estate or a freeholder, so that he is solvent and resides within the jurisdiction of the court.

Presentation and demand of "the book-keeper," of the makers of the note at their counting room, is a sufficient demand, without giving the name of the clerk or book-keeper.

So notice of protest left "on board the Brig A, with the mate, which vessel he commands," is sufficient to bind the endorser, without naming the mate.

The endorser cannot complain that he received earlier notice by sending it on board his ship, than if sent by mail as required by law.

The endorsement of defendant need not be proved when he does not specially deny it.

An affidavit for a new trial, on the ground of newly discovered evidence, is insufficient, if it does not state the evidence was discovered *since* the trial.

This is an action against the endorser of a promissory note, grounded on an attachment. The defendant set up several matters in defence. There was judgment against him and he appealed.

Emmerson, for the plaintiffs.

Crawford, for the appellant.

Garland, J. delivered the opinion of the court.

This is an action by the holders of a promissory note against the payee as endorser, commenced by attachment, which was levied on the defendants's interest in the Brig Cuba. A few days after filing the petition, the defendant took a rule on the plaintiffs to show cause why the attachment should not be set aside :

1st. Because the affidavit made by the plaintiffs' attorney did not state whether it was taken as agent or attorney in fact of said plaintiffs.

2d. It does not appear by the record that the plaintiffs were absent at the inception of the suit, so as to authorize the intervention of an agent or attorney.

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3d. Because the surety in the attachment is insufficient; not being a free-holder.

The Judge of the Commercial Court overruled these objections. The defendant then answered, denying generally all the allegations in the petition; there was judgment against him, and he appealed.

In this court the counsel for defendant, relies upon his objections to the attachment, which we will dispose of before proceeding to the merits.

I. The affidavit is made by the attorney at law of the plaintiffs, and it was therefore not necessary to state he was the attorney in fact.

Where the attorney at law makes the affidavit for an attachment, he need not state that he is attorney in fact.

II. The petition states the plaintiffs are residents of another State, and if the defendant wished to avail himself of any insufficiency in the affidavit, he ought to have directly denied their absence or alleged their presence, so as to enable them to have met him by evidence; but he has chosen to appeal to the record and must be bound by its contents. It states their non-residence, which raises a presumption of absence.

If the pleadings state the non-residence of the plaintiffs, their absence, and right of their attorney to make affidavit for them, will be presumed, when the contrary is not alleged or shown.

III. The law does not require that the surety on an attachment bond shall be the owner of real estate or a free-holder. The article 245 of the Code of Practice says he shall be a good and solvent person residing within the jurisdiction of the court, and the solvency of the surety is not denied.

The surety in an attachment bond need not be owner of real estate or a free-holder, so that he is solvent and resides within the jurisdiction of the court.

On the trial of the case, the defendant objected that the protest and notice were not sufficient to charge him; because the name of the clerk of the drawers to whom the note was presented for payment is not given. The notary says he "presented said note to the book-keeper of Renshaw & Rogers at their counting room in this city, and demanded payment, &c." This is in our opinion a sufficient demand. The person to whom the note was presented was designated by his occupation and the position he occupied in the house of the drawer as dis-

Presentation and demand of "the book-keeper," of the makers of the note at their counting room, is a sufficient demand, without giving the name of the clerk or book-keeper.

EASTERN DTS. tinctly as if his name had been given, and it would not have
June, 1841. been difficult to have found him, if the defendant supposed his

AUSTIN ET AL. testimony would have been of any service to him.

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It is further objected the notice of non-payment was insufficient. The Notary says, "notice to B. R. Latham, left on board of Brig Apalachicola with the mate, which vessel he commands." We have no doubt this is sufficient, although the name of the Mate is not given. It has been held in various cases, that leaving a notice at the store of an endorser with his clerk without naming him is sufficient; 14 *La. Rep.* 494; 15 *Idem* 51, 113, 115.

So notice of protest left "on board the brig A, with the mate, which vessel he commands," is sufficient to bind the endorser, without naming the mate. It is contended that as the defendant was a non-resident notice ought to have been sent him by mail. It would perhaps have been sufficient if the Notary had done so, but as he was at the time in the city, he complains with very little grace of a more prompt notice, whereby an earlier opportunity was given

The endorser cannot complain that he received earlier notice by sending it on board his ship, than if sent by mail as required by law. him of proceeding against the drawers for indemnity.

The endorsement of defendant need not be proved when he does not specially deny it. There was no necessity of proving the endorsement of the defendant, as he had not specially denied it; and the evidence

An affidavit satisfactorily establishes the signature of the intermediate endorser.

The affidavit upon which the application for a new trial is based is insufficient, as it is not stated that the evidence mentioned was discovered after the trial, and no diligence is shown to procure it previously.

The judgment of the Commercial Court is therefore affirmed with costs.

HEALY vs. WAGNERS.

EASTERN DIS.
June, 1841.

APPEAL FROM THE COMMERCIAL COURT OF NEW ORLEANS.

DUCLERC,
vs.
CREBASSOL
ET AL.

The appeal will be dismissed when there is nothing by which the judgment below can be tested.

This is an action against the acceptors of a bill of exchange, who have appealed from a judgment against them; but the record is imperfect and incomplete.

L. C. Duncan, for plaintiff.

Morphy, J. delivered the opinion of the court.

In this case there is neither statement of facts, nor bill of exceptions, nor assignment of errors, nor any other means afforded, by which the correctness of the judgment and proceedings below can be tested or examined.

The appeal is therefore dismissed with costs.



DUCLERC vs. CREBASSOL ET AL.

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF
NEW ORLEANS.

Where the debtor makes a cession of his property which has been sequestered, it should be delivered up to the syndic to be sold; the privilege or claim of the suing creditor being preserved on the proceeds. The sequestration is consequently cancelled.

This is an action by a printer, instituted the 15th March, 1837, to recover from the defendants \$1100. the price of a printing establishment, which he had sold them; also \$484, for wages due him as a printer while in their employ, and damages. He had the printing establishment sequestered.

EASTERN DB.
June, 1841.

DUCLERC
VS.
CHENBASSOL
ET AL.

On the 20th March, only five days after the institution of this suit, the defendants made a surrender of all their property for the benefit of their creditors; including the printing establishment. The syndic obtained an order to sell the property; and also a rule on the plaintiff to set aside the sequestration and have the property delivered up to him. This rule was made absolute and the plaintiff appealed.

Grivot, for plaintiff, submitted the case, on the pleadings; having been subsequently employed in the suit.

Pepin, contra.

Simon, J. delivered the opinion of the court.

Plaintiff, who is a printer, claims the payment of a sum of eleven hundred dollars, being the price of his printing establishment, which he sold to the defendants, and on which he alleges to have the vendor's privilege; the sale was made in a note payable at six months, which note never was furnished according to the conditions of the contract. He also sues to recover the sum of four hundred and eighty-four dollars, as the amount of his salary while he was under the employment of said defendants, and three hundred dollars damages.

Before filing his petition, he obtained a writ of sequestration of all the objects composing the printing establishment, in order to secure the exercise of his legal privilege thereon. A short time after this suit was instituted, the defendants sued their creditors for a surrender of property, and carried the property sequestered on the schedule of their affairs; the cession was accepted by the court, a meeting of the insolvents' creditors took place, and a syndic was regularly appointed.

On the 26th of June, 1837, the syndic took a rule on the plaintiff to show cause why the sequestration should not be set aside, on the grounds: 1st, that the plaintiff was a partner of the defendants, and consequently cannot maintain this action; and 2d, that the property sequestered had been by them ceded to their creditors. The rule was made absolute, the order of

sequestration was cancelled, and the syndic was authorized to cause the printing office to be sold, in such a manner as to preserve to the plaintiff the exercise of his alleged rights upon the proceeds thereof. From this judgment the plaintiff appealed.

EASTERN DIS.
June, 1841.

DUCLERE
VS.
CHENASSOL
ET AL.

We think the parish judge did not err : we understand the object of the law in permitting a writ of sequestration to issue, to be the preservation of the property in dispute during the pendency of the suit; it is allowed as a conservatory measure to prevent a defendant from ill-using the property and from doing any act which may be prejudicial to the other party during the progress of the action, and previous to the decision of the cause; but it does not in any manner affect, increase or diminish the rights of either of the parties to the property sequestered. In this case, the matter in controversy was yet unsettled at the time that the defendants sued their creditors; according to the rule repeatedly recognized in our jurisprudence, the present suit was to be cumulated with the insolvents' proceedings, and the defendants having, by the cession, become incapable of appearing in court to defend this action, it became the duty of the syndic to intervene for the purpose of contesting the plaintiff's claim and of bringing it to a final and speedy adjustment. The acceptance of the cession by the judge, having the effect of vesting all the debtors' rights of property in the creditors, it is clear that the plaintiff could not any longer proceed to exercise his privilege, if any he have, on the property sequestered, and that the printing establishment in question having been delivered by the insolvents to their creditors, the same is to be sold by the syndic in due course of law for the benefit of the mass, the privilege of the vendor being preserved on the proceeds of the sale; if so, the order of sequestration preventing said sale became useless and must be rescinded, and the syndic ought to be allowed to sell the property sequestered as being a part of the insolvent estate, without prejudice to the rights which the plaintiff may have on its proceeds under the allegations set forth in his petition.

Where the debtor makes a cession of his property which has been sequestered, it should be delivered up to the syndic to be sold; the privilege or claim of the suing creditor being preserved on the proceeds. The sequestration is consequently cancelled.

EASTERN DIS.
June, 1841.

**COUNCIL
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We are of opinion that the order of sequestration was properly cancelled, so as to authorize the syndic to proceed to the sale of the property in dispute in the manner and with the reservations contained in the judgment appealed from.

It is therefore ordered, adjudged and decreed that the judgment of the Parish Court be affirmed with costs.



COUNCIL OF LAFAYETTE vs. KOHN.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Oppositions to the valuation and assessment of property in the city of Lafayette must be made within the time prescribed and advertised, or they will not be listened to in court.

The assessment roll is admissible in evidence, to show that taxes were duly assessed. If defendant objects that it is not the true one, he should show, or call for the true one.

This case comes up on a suit to collect the arrearage of taxes due on defendant's property in the city of Lafayette according to the assessment made under the laws relating to the subject, and vesting the power to lay and collect taxes in said city council.

The plaintiffs show that said taxes were duly assessed, due notice given when they became due and payable, and proper demand of payment.

The defendant came in and pleaded the general issue. He denies that his property has been legally and properly assessed.

There was judgment against the defendant and he appealed.

M Kinney, for the plaintiffs.

Thos. Slidell, contra.

Garland, J. delivered the opinion of the court.

This suit is brought to recover the taxes assessed by the plaintiffs, for the year 1837, on the property of the defendant, situated within the limits of the city of Lafayette, amounting to \$594 86. The answer is a general denial.

On the trial the plaintiffs showed that by an act of the legislature, approved the 12th March, 1836; Sess. acts 1836, p. 132, sec. 6, and acts 1837, p. 88, sec. 1; they were authorized to appoint assessors who shall have the same powers as are by law vested in the assessors of State taxes, and that in default of the payment of the taxes so assessed, within the period which said president and board of council shall prescribe, they are authorized to bring suit against all persons in default and recover them with interest at the rate of eight per cent. from the time due until paid.

The plaintiffs show the appointment of assessors, the assessment roll, its deposite in the council room and a notice duly advertised calling on all persons interested to come forward and oppose it, if injustice had been done them. The defendant does not appear to have complained within the time specified of the assessment and we think it is too late now. If the judicial power could have given any relief against an excessive valuation of property, which is extremely doubtful, it is too late now to ask it. The opposition should have been made within the time allowed by law, but as the defendant has not made any, he is precluded from doing so now. A different doctrine would subject the collection of taxes assessed by the State and municipal corporations to an infinite number of embarrassments and delays, and prove an eternal source of litigation.

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COUNCIL
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Oppositions to the valuation and assessment of property, in the city of Lafayette, must be made within the time prescribed and advertised, or they will not be listened to in court.

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On the trial the defendant objected to the introduction, as evidence, of the document purporting to be an assessment roll for the year 1837, as there was no proof of its being the same approved by the city council. The district judge overruled the objection and a bill of exception was taken.

The assessment roll is admissible in evidence, to show that taxes were duly assessed. It defendant objects that it is not the true one he should show or call for the true one.

We are unable to see the force of the objection. The plaintiffs by offering it in evidence showed their intention of being governed by it, and if any roll existed, the defendant should have made its existence somewhat probable, by his own affidavit at least, and called on plaintiffs to produce it in court. If it were at all probable another and different roll existed, it was easy to prove it by the president or secretary of the council or some of the three assessors.

The defendant alleges that as the law says, that "in default of payment of said taxes, within the period which the said president and board of council shall prescribe, the said board is authorized to bring suit," and as no time has been prescribed for payment, no action can be maintained as he is not in default. It is true no particular day appears to have been fixed when all persons are to appear and pay their taxes, but as relates to the defendant a time has certainly been fixed, as the collector of the corporation and the attorney of record called on him for payment, and only after his refusal to pay, was this suit instituted.

The plaintiffs have not asked for damages for a frivolous appeal or an amendment of the judgment in relation to interest, it is therefore affirmed with costs.

SHAKESPEARE ET AL. vs. SAUNDERS.EASTERN DIS.
June, 1841.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

**SHAKESPEARE
ET AL.
vs.
SAUNDERS.**

It is necessary to allege and show that an absconding insolvent debtor was "a merchant or trader," under the act of 1826, to sustain an action for a forced surrender. The allegation must be made in the pleadings, in order to let in evidence in proof of it.

This is an action instituted by three of the creditors of William Saunders, alleging he is an absconding insolvent debtor, and is justly indebted to them in the several sums alleged and sworn to in their affidavits. They pray for a forced surrender and sequestration of all their debtor's property.

A meeting of creditors was held and their proceedings returned into court.

Almost at the same time of instituting these proceedings Bedford & Beck commenced an attachment suit against the absconding debtor. They also made opposition to the homologation of the proceedings of the creditors; which being overruled, and the proceedings confirmed and homologated, the opponents appealed.

Durant, for the plaintiffs.

Lockett & Micou, for the opposing creditors.

Garland, J. delivered the opinion of the court.

The petitioners allege they are creditors of Saunders for various sums; that he has absconded and clandestinely left the State, to avoid the payment of his debts, taking with him a large portion of his property, for the purpose of defrauding his creditors. They further allege his insolvency and the fact of his having left property subject to deterioration. They pray for a forced surrender against their debtor, a meeting of his creditors, the appointment of a syndic and a stay of proceedings against his person and property; also that a writ of sequestration issue. The district judge granted the sequestration, ordered a meeting of creditors and a stay of all proceedings against the person or property of the absconding debtor.

On the same day this petition was filed, Bedford & Beck

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presented their petition to the same court, stating themselves to be creditors of Saunders for a large amount, that he had absconded and prayed an attachment against his property. The attachment was granted by the clerk and levied on the property previous to the writ of sequestration.

A number of creditors met in concourse, proceeded to appoint a syndic and ordered a sale of the property. Upon the return of these proceedings into court Bedford & Beck filed their opposition to their homologation, because it is not alleged in the petition or affidavits that Saunders was a *merchant* or *trader*, which they say is necessary to entitle the plaintiffs to the remedy they have adopted; they say he is such and ask all the proceedings be declared null and void as being contrary to law.

This proceeding it is alleged is authorized by the 6th section of the act of 1826, relative to voluntary surrenders; 2 Moreau's Dig., 438, which says, "if any merchant or trader abscond or conceal himself in order to avoid the payment of his debts, it shall be lawful for three or more of his creditors to apply to any competent judge, after having made affidavit that said merchant or trader has actually absconded or concealed himself in order to avoid the payment of his debts or to be sued therefor, as well as the specific amount of their respective debts, &c.," to obtain an order for a sequestration, a meeting of creditors and the appointment of syndics.

On the trial of the opposition the counsel for plaintiffs offered evidence to prove Saunders was a merchant or trader within the meaning of the act of the legislature, to which the counsel for the opponents objected, on the ground there was no allegation in the petition or affidavits to that effect, this objection the court below overruled, admitted the testimony and the opponents excepted. We think the judge erred. The proceeding is one of a peculiar character and can only be prosecuted against persons engaged in certain pursuits under particular circumstances, and it is important all those circumstances be stated. One is of as much consequence as the other.

"In the year 1823, the legislature abolished the forced surrender as it existed by the Spanish law, and restricted the right of compelling a surrender to cases when the debtor was in actual custody;" 2 Moreau's Dig., 436. In 1826 the law was re-enacted only in relation to *merchants and traders*; 7 La. Rep., 425. These words are used in the insolvent system as forming a part of it. They are in bankrupt laws technical terms, having a particular meaning and are to be received and understood according to the acceptation they have in the art or profession to which they refer.

This proceeding is an exception to a general rule, and nothing is to be left to inference or conjecture in behalf of parties wishing to avail themselves of it. We think it is as important to have alleged that Saunders was either a merchant or trader as to have alleged he was insolvent or had absconded, and there being no such allegation in the petition, the plaintiffs had no more right to give evidence of his being a merchant or trader, than they would have of his indebtedness, if they had omitted to allege it.

The judgment of the District Court is therefore annulled, avoided and reversed, the opposition of Bedford & Beck is sustained and the petition of the plaintiffs and all the proceedings under it dismissed and set aside at their costs.

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It is necessary to allege and show that an absconding insolvent debtor was "a merchant or trader," under the act of 1826, to sustain an action for a forced surrender. The allegation must be made in the pleadings, in order to let in evidence in proof of it.

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APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where persons representing a succession, executed their notes to the creditor for the original debt due by it and secured by mortgage, their obligation is in the nature of the *pactum constitutæ pecuniæ*, engaging their *personal liability*, that the debt should be paid within a certain time, or the creditor be at liberty to seek payment according to his original right, on his mortgage.

If the new obligation be for more than was legally or actually due on the original one, the mistake being discovered the *pact* or *new obligation* is void, *pro tanto*, for want of a debt which was the foundation of it.

The recognition of a debt is always to be understood with reference to a *primordial title*; and if the party is *obliged* further, or otherwise than as the primary title imports, on showing the error he will be relieved.

So where R. & Z. being heirs of a succession and administering it as executors, gave their notes to the creditor by original debt and mortgage, who reserved the right to go upon his mortgage if the notes were not punctually paid, and did so after the payment of the first note; and in which the debt was ascertained by a judgment to be *much less* than the amount for which the *new obligation* were given: *Held*, that there was error for this amount, and the new obligations can have no effect.

Bullard, J. and Martin, J., dissenting.—The failure to give notice of the extinguishment of a mortgage, did not forfeit accruing interest; it only authorized a *suspension* of the payment. Interest still runs in such a case, although not exigible.

If it be the essence of the *pactum constitutæ pecuniæ* that there should be a pre-existing debt, it is only to avoid a donation; but it suffices if the debt, the payment of which is promised, should be due in *foro consciencie*, and that there should exist a just subject for payment, although it may be in *foro legis* declared null.

These are cross actions. In the first the plaintiffs, Relf & Zacharie allege and show that on the 1st of July, 1829, they executed to the defendant, M'Donogh, six promissory notes for the entire sum of \$74,779 84, payable annually in six years from the time the first became due, to wit: on the 1st April, 1830. These notes were given by the present plaintiffs to liquidate an old debt secured by mortgage, called the "Pemberton debt," due by a plantation and slaves, purchased by

Madame Zacharie in 1821, but which was originally purchased from M'Donogh by John T. Pemberton in 1818; she assumed the payment of Pemberton's notes and took his place. At the time of executing the notes in question, Madame Zacharie was dead and her estate under administration by Relf & Zacharie, as executors, and who were also her heirs. The plantation and slaves were sold at probate sale and her other son, P. F. Theodore Zacharie, became the purchaser. On the 1st July, 1829, M'Donogh presented his account for the balance due on the Pemberton debt by the plantation, including interest up to that date, and to liquidate the same the notes now the object of contestation were given; M'Donogh at the same time giving a receipt, in which he expressly reserves the right and privilege, if the notes were not punctually paid, to go upon his original Pemberton mortgage to enforce the payment of this debt.

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In 1830, the first of these notes for \$8987 became due and was paid. The next year the plaintiff's finding the property encumbered by some old mortgages, or from some other cause, declined paying any more of their notes. On the 10th of May, 1832, M'Donogh took out his order of seizure and sale on the Pemberton mortgage, against the plantation and slaves, then in the hands of Theodore Zacharie, as third possessor. He made opposition, suspended the order of seizure, and on the 10th June, 1832, the case was transferred to the *via ordinaria* by the service of citation on the defendant. He set up a defence, principally grounded on the failure of the plaintiff to comply with his stipulations for the release and notification thereof of certain incumbrances or mortgages to Pemberton. The case was finally decided and the whole *Pemberton debt*, due also by the plantation and slaves, liquidated and settled by a final judgment of this court, at the sum of \$52,028 63, and which has been paid. See the case in 5 La. Reports, 247.

The plaintiffs now allege their notes were given without cause or consideration and pray that they have judgment for the

EASTERN DIS. amount of the first note which they had paid and that the others
July, 1841. be delivered up to them.

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The defendant, M'Donogh, pleaded the general issue.

On the 26th March, 1836, M'Donogh instituted suit against Relf & Zacharie, for a balance due on the five remaining notes, including all interest up to this date, which, after allowing all past credits and payments, according to his calculations, leaves the amount due him, \$36,796 22, and for which he prays judgment. This account is made up to March 24th, 1836, and includes as a credit the judgment of \$52,028, which he recovered against Theodore Zacharie.

The defendants pleaded the general issue: and they aver that the debt for which the notes sued on, were given had been settled and liquidated by a judgment of the Supreme Court, which judgment had since been paid by J. W. Zacharie, one of said defendants, as evidenced by notarial act and receipt at full, dated the 5th September, 1834, and signed by the plaintiff.

On these pleadings and issues the two cases after being consolidated, were tried by the court. There was judgment in the case of M'Donogh against Relf & Zacharie in favor of the latter; and in the case of Relf & Zacharie against M'Donogh there was judgment that the five remaining notes of plaintiffs be cancelled and annulled. It was admitted that R. Relf, one of the makers of the notes in contestation, was the son-in-law of the deceased Madame Zacharie, by *two marriages*, and natural tutor of the minor children, and represented two portions of her estate; and that J. W. Zacharie, her son and co-obligor of Relf, represented his own portion; and that these two persons as executors had the principal management of the affairs of her succession. It was also admitted that the suit against Theodore Zacharie was on her assumption of the Pemberton debt and mortgage as set forth in the record and proceedings of said suit which are in evidence.

The remaining facts of this case are fully stated in the ar-

guments of counsel and in the opinions of the judges which follow. EASTERN DIS.
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The case was originally argued by brief by *Mr. D. Seghers* and *Judge Watts* on the part of the appellees ; and by *Mr. Grymes* for the appellant, M'Donogh.

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D. Seghers, for the appellees.

On the 1st of July, 1820, M'Donogh entered with J. W. Zacharie and Richard Relf, in their own personal names, into an agreement concerning his claim on Mrs. Zacharie's estate, and took their notes for it. This agreement, with a statement of the claim, and his receipt for their notes, are in evidence, and are marked by the letters A and B. It is to be remarked, that the whole of these documents, as well as the body of all the notes, are in the hand-writing of M'Donogh; and it is clear, therefore, that he was the man who stipulated, and that, consequently, in case of doubt, the stipulation is to be construed against him. *Louisiana Code*, article 1952. But it is believed there can be no doubt about the meaning of the parties to this contract, which is the axis on which the whole case turns.

In or about the year 1830, the testamentary executors of Mrs. Zacharie caused the whole of her estate to be sold by the judgment of the Court of Probates of the parish of Iberville, where her succession was opened ; and at this sale, the plantation and slaves mortgaged to M'Donogh, were sold to Theodore Zacharie, one of the heirs of Mrs. Zacharie, subject to the mortgage of M'Donogh, and with the condition, that the purchaser should bind himself to pay and satisfy the claim of M'Donogh on the succession of Mrs. Zacharie, secured by said mortgage.

From the tenor of the receipt given by M'Donogh to R. Relf and J. W. Zacharie, for their notes, it is clear that M'Donogh reserved to himself the choice of the two remedies, viz: to enforce the payment of either of their notes by bringing a personal action against them, or to disregard the

EASTERN DIS. *arrangement (the receiving of their notes,) as if it had*
July, 1841. *never taken place, and to sue out an order of seizure and sale*

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on the notes of Pemberton, by foreclosing the mortgage against the third possessor of the plantation and slaves.

It is also clear, from the tenor of the same document, that in case of payment by R. Relf and J. W. Zacharie, of their notes, M'Donogh was to give up to them the original notes of Pemberton, and to subrogate them to his mortgage, and to his claim under it. This was the true, the only consideration for their notes. Now, from the spring of 1831, M'Donogh made his selection by suing out an order of seizure and sale on the notes of Pemberton, against the third possessor, Theodore Zacharie, holding him at the same time, personally liable for the debt, in virtue of the conditions on which he had purchased the premises at the probate sale. 3 *Louisiana Reports*, 313.

From this period, the consideration of the notes subscribed by R. Relf and J. W. Zacharie, failed, and it is on that ground they brought their action against M'Donogh for the restitution and cancelling of their notes. M'Donogh having failed in that suit against Theodore Zacharie, and his order of seizure and sale having been quashed, he afterwards brought another suit against the said Theodore Zacharie, as third possessor, and as personally liable, (so as above stated,) and in this latter suit obtained an order of seizure and sale for the amount due him on the notes of Pemberton. This amount, in principal and interest, was finally and contradictorily settled by the judgment of the Supreme Court, on an appeal taken by Theodore Zacharie, of the judgment rendered by the fourth District Court, sitting at Iberville, and by which the order of seizure and sale had been granted. Neither Richard Relf nor James W. Zacharie were parties to this suit; it is, as to them, *res inter alios acta*. The above judgment of the Supreme Court, settling the amount due on the notes of Pemberton, was enforced by M'Donogh, who caused the plantation and slaves mortgaged as aforesaid, to be sold on the writ of seizure

and sale against Theodore Zacharie. At the sheriff's sale, EASTERN DIS. July, 1841. James W. Zacharie became the purchaser of the same, as the last and highest bidder, and as such, paid off, out of the price of his purchase, to M'Donogh, the amount of his judgment. M'Donogh gave him a receipt in full for it, and raised the mortgage by an act passed before H. B. Cenas, notary public, a copy of which act is in evidence and on file in the present suit. Now, it is clear, that by this act, as well as by executing the above judgment, the notes of Pemberton are become extinct, and that, consequently, M'Donogh is in the impossibility to give them up and surrender them to Richard Relf and James W. Zacharie, were they to pay their notes, and he can thus no longer fulfil his part of the contract by delivering them the said notes of Pemberton, as stipulated in the above document [A.] It is idle to talk about collateral security; no such thing was either intended or stipulated by the parties. It is idle to say that Richard Relf and James W. Zacharie had waived the exception pleaded by Theodore Zacharie in his defence against M'Donogh. They did not act in that instrument (A.) as executors; and even in that capacity they would have had no right to waive it: in their own name they had nothing to do with it, and were ignorant of it: but at all events, M'Donogh chose to try the exception with the third possessor, Theodore Zacharie, without calling in either James W. Zacharie or Richard Relf; he did it at his own risk; and now, that the notes of Pemberton are extinct by his own act, and that he can no longer surrender these notes to James W. Zacharie and Richard Relf, and subrogate them to his mortgage and personal claim, which are likewise extinct, he cannot be suffered to recover on their notes, for which he cannot give the intended consideration; these notes are, therefore, null and void, being given without consideration, and must be returned to the drawers, at the cost of M'Donogh.

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Grymes, for the appellant, M'Donogh, maintained the following points:

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1st. In order to understand the principles of this case, it is necessary to have a clear statement of the facts:

In the present instance there is, in this respect, no difficulty or danger of mistake, they are all in writing, and as follows:

The plaintiff, M'Donogh, on the 23d day of January, 1818, sold to one John T. Pemberton, a tract of land and slaves, situated in the parish of Iberville, and received in payment therefor (\$12,000,) twelve thousand dollars in cash, and ten promissory notes of (\$11,800,) eleven thousand three hundred dollars each, payable on the last day of March in each year, with a stipulation, that if any of the first six notes were not paid at maturity, they should thereafter bear an interest of six per cent., and that the last five notes should each bear an interest at the same rate, from and after the last day of March, 1823, up to the time they respectively came due; and this was incorporated into, and made a part of the body of the said five notes, and consequently, a part of the price of the land and slaves sold, and a mortgage was reserved to secure the payment of principal and interest.

2d. On the 27th of March, 1821, the said John T. Pemberton sold and conveyed the land and slaves, with an additional number of twenty-four slaves, to Joseph Erwin, who substituted himself in lieu and place of the said John T. Pemberton, and undertook to pay to the plaintiff, M'Donogh, all that was due to him for the original price of the land and slaves, and to secure his performance of the obligation, mortgaged the land and slaves, as well as the additional twenty-four slaves purchased from Pemberton. On the first day of October, 1821, Joseph Erwin sold and conveyed the land and slaves thus purchased from Pemberton, to Mrs. Ann Waters, widow Zacharie, who substituted herself in lieu and place of the said Joseph Erwin, towards the plaintiff, M'Donogh, and M'Donogh intervened in the act, and discharged Erwin, and accepted Mrs. Zacharie as his debtor.

3d. Shortly after this last sale, Mrs. Zacharie died, and left the defendants, Richard Relf and James W. Zacharie, her

executors testamentary, who, at the same time, represented EASTERN DIS.
three portions of the estate left by her. July, 1841.

4th. On the 1st day of July, 1829, all the notes being then due, and a large portion of the five first still unpaid, and the whole of the five last, and the plaintiff, M'Donogh, entitled to proceed against the succession of Mrs. Zacharie for the whole amount of the price then due, settled and arranged, the account of capital and interest, upon the basis of the stipulations contained in the act of sale to Pemberton, and the obligation contained in the body of the last five notes, with Relf and Zacharie, who asked and obtained from the plaintiff, M'Donogh, a further prolongation of the time of payment, of six years from that date, on their giving their individual notes at one, two, three, four, five, and six years for the amount, with six per cent. interest for the time they had to run, making themselves the principal debtors, and leaving the old notes of Pemberton with the mortgage, as a security for their eventual payment.

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5th. The first of the notes so given by Relf and Zacharie, was paid by them at maturity; all the others they refused to pay, and the plaintiff, M'Donogh, is now, as he ever has been, the holder of them; and for the amount of this first note paid, they received a credit for the full amount, on the note of Pemberton due on the last day of March, 1825.

6th. On the neglect or refusal of the said Relf and Zacharie to pay their notes as they became due, the plaintiff, M'Donogh, resorted to judicial proceedings to obtain payment, and he, in the first instance, resorted to the collateral security, viz: the mortgage and notes of Pemberton; and on the 4th day of June, 1832, he instituted an hypothecary action against the land and slaves in the hands of the third possessor, Philip Felix Theodora Zacharie, to whom the same had been adjudicated by the Court of Probates of the parish of Iberville, for the purpose of partition among the heirs, he being himself a son of the deceased, and one of the co-heirs.

7th. In the prosecution of that action, the arrangement

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M'Donogh, was not introduced, nor was any reference had to it; the defendant did not offer it, and the plaintiff could not: it was in the possession of Relf and Zacharie, who now produce it, out of the power of the plaintiff, M'Donogh; and if in his power, not competent evidence in a suit between him and the third possessor, who was no party to it, it being purely a personal and individual obligation from Relf and Zacharie to him, and consequently, the judgment of the Supreme Court in that case, had, and can have no effect upon its validity, or the rights of the parties under it.

8th. The judgment of the Supreme Court, in that case, relieved the third possessor from the obligation to pay interest, for reasons solely applicable to the position and rights of the parties to that suit, resulting from the original contract with Pemberton. Nothing else was submitted by the pleadings; nothing else is embraced by the decree.

9th. The land and slaves were sold under the decree of the Supreme Court, in 1838, and the defendant, James W. Zacharie, became the purchaser at the sheriff's sale, of the whole, for the price of \$52,000, at twelve months credit.

10th. The plaintiff, M'Donogh, brought his suit against Relf and Zacharie, to be paid the balance due on the remaining five notes given by them under the agreement of the 1st of July, 1829, after crediting them with the amount made by the sale of the land and slaves, and the plaintiffs, Relf and Zacharie, brought their suit to compel M'Donogh to cancel and deliver them up. The two cases are consolidated, and form the matter in contestation, which the court is now called upon to decide.

The first, and perhaps the only legal proposition that it is material for the court to consider, is, whether there was a legal and valid consideration for the notes given by Relf and Zacharie, under the arrangement of the 1st of July, 1829. And secondly, has any subsequent circumstance or event taken place which has destroyed that consideration, or which

ought in law or justice to discharge them from the obligation to pay ?

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As to the first, they had, in their different capacities of heir, father and tutor of minors, and testamentary executors, a direct and positive interest in the succession they were administering; and consequently, it was an object with them to preserve it from loss or deterioration, which would have been the result of an immediate judicial pursuit in 1829, upon the original mortgage of Pemberton, which was then all due, and payable. This is a good and sufficient interest, and consideration upon which to found a personal promise to pay, clear, palpable, and visible to all parties, and not susceptible of mistake, misapprehension or surprise, nor is any either alleged or proved. The agreement to pay interest, so far as it relates to what had occurred previous to the arrangement of the 1st of July, 1829, is based upon the stipulations in the original act of sale to Pemberton, and the obligation contained in the body of the notes, the interest or compensation for the delay was fair and moderate, and within the protection of the law, and consistent with equity and good conscience, and formed a part of the contract of sale, and the price of the thing sold. With respect to that stipulated to accrue after the 1st July, 1829, the forbearance or delay of six years, in the recovery of the principle, was an ample, legal and equitable consideration.

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How have the defendants, Relf and Zacharie, been discharged from this obligation? Their only refuge is in the judgment of the Supreme Court, rendered in the case, and introduced by them in evidence. This can operate no discharge to them; it is evident for the following reasons:

1st. The suit was a proceeding, *in rem*, against the land and slaves, in the hands of Philip F. T. Zacharie, the third possessor, and to which the defendants, Relf and J. W. Zacharie, were no parties.

2d. The obligation of Relf and J. W. Zacharie, in their personal and individual capacities, as it is now sued on, was never involved in, and formed no part of the subject matter of

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now sued, and the obligation imposed on the possessor of the property under the original sale which can make the judgment in the one case re-act upon the other; they depend upon entirely different principles and considerations.

If these reasons, strong and conclusive as we believe them to be, need any thing to support and sustain them, the court, we think, will find abundant and triumphant matter to that effect in the following:

1st. The judgment of the Supreme Court, is founded upon an oversight or neglect, on the part of the plaintiff, M'Donogh, to give notice to his original purchaser, Pemberton, or those claiming under him, of the raising and annulling certain mortgages, which the plaintiff stipulated to have raised in the original act of sale of 1818, to Pemberton. Now, if this was a technical objection which would bar the recovery of interest against the third possessor of the land and slaves, or against the heirs or executors of Mrs. Zacharie, in their representative and subrogated capacities, it is an objection which Relf and Zacharie had a right to waive for a good consideration; it existed in full force on the 1st July, 1829, was as obvious then as it was in 1832, and their contracting the personal obligation, and giving in that capacity the notes now sued, on, is a clear and explicit waiver, so far as they are concerned. The objection was not one founded on conscience, equity, or good faith, it was merely formal and technical, and required no precise or specific consideration for the forbearing to urge or use it.

2d. The use of this technical objection on the part of Philip F. T. Zacharie, and his succeeding in it, has had the effect to increase the succession of Mrs. widow Zacharie, by the whole amount of interest deducted from the claim of the plaintiff, M'Donogh, in his suit, *in rem*, against the mortgaged property, and the present defendants come in for their share of this gain.

Now, if this objection was made by P. F. T. Zacharie in

conjunction, or by the counsel, consent or connivance of the present defendants, Relf and J. W. Zacharie, and the success of that defence be a bar to the present action, then they are permitted to use a mere technical or formal matter in one capacity, as heir, &c., to increase their estate, and to use the same judgment rendered in their favor in one capacity to break down and destroy a contract made by them in another capacity, and thus enrich themselves at the expense of good faith, and the solemn obligations of a contract which they do not pretend to say was founded either in fraud, mistake or ignorance, and thus make a mere matter of form applicable to one case, triumph over law, equity and justice, in another and a different case.

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If this defence was made by P. F. T. Zacharie alone, without the knowledge, consent or connivance of the present defendants, then the parties remain as they were, the judgment is good for him, *quo ad* his interest in the succession of his mother, and he has a right to profit by it; but if the other parties attempt to do so at our expense, law, justice and equity, requires that the personal obligation they have contracted, should interpose and prevent the consummation of a legal fraud.

3d. At the sale made of the mortgaged property, after the final judgment of the Supreme Court, James W. Zacharie, one of the defendants, became the purchaser of all the mortgaged property, for the price and sum of fifty-two thousand dollars, at twelve months credit, not much more than one third of the price paid by his mother. Under such circumstances, to release him from a personal obligation, contracted in good faith on the part of the plaintiff, for a good consideration on his part, without one particle of proof to taint its purity or justice, in any view or shape, would be to hold out a premium to men to enrich themselves at the expense of all that is valuable in the law of contracts.

Judge Watts, for the appellees in reply.

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1st. The account of the Pemberton debt as stated by M'Donogh, his receipt, and the notes of Relf and J. W. Zacharie, given on the 1st of July, 1829, constitute an agreement or contract between M'Donogh on the one part, and Relf and J. W. Zacharie on the other, relative to a debt due by Pemberton, and the succession of Mrs. Zacharie, secured by mortgage on the plantation.

2d. Either this agreement is an independent contract of sale of the Pemberton notes, with a resolutive condition, and then it was dissolved by the foreclosure of the mortgage, or Relf and Zacharie became sureties in a collateral or accessory contract, or guarantors, of the Pemberton debt, and bound themselves, *in solido*, for its payment.

3d. Every obligor in an obligation, *in solido*, is, in one sense, a principal debtor, viz : he owes the whole debt, but, as between the original parties to the contract, one debtor may be the principal or real debtor and the others only his sureties. In the present case, Pemberton, then Mrs. Zacharie, then P. F. T. Zacharie, were successively principal or real debtors.

Relf and J. W. Zacharie, were never more than sureties or guarantors, bound *in solido*.

4th. In a litigation between the original parties, to an obligation *in solido*, when there exists a real debtor, viz : a debtor in his own right and the others are sureties, the sureties or guarantors are only bound to pay the amount of the real or principal debt, and may avail of any exception (*exceptions realles*) arising out of the contract, or any failure of consideration, to reduce the debt.

5th. So also, if Relf and Zacharie be considered as guarantors of the payment of the Pemberton debt, they are only bound to pay so much of the debt as became due under the original contract with Pemberton.

6th. The Pemberton debt as set forth in M'Donogh's account or statement of 1st July, 1829, was the consideration of the notes given by Relf and Zacharie ; that consideration has failed to the amount now claimed by M'Donogh from defendants.

7th. The exceptions and defences by which the Pemberton debt was reduced, were exceptions and defences which grew out of the contract; and such as sureties or guarantors may avail of.

8th. There is no evidence that Relf and Zacharie knew of, or meant to waive any exceptions to the contract or defences by which the debt could be reduced.

If it was intended to waive them, it should have been inserted in the contract; as sureties they could not waive any defence growing out of the contract.

9th. The real amount of the Pemberton debt was fixed in the suit of M'Donogh vs. P. F. T. Zacharie, and has been paid in full.

10th. Relf and J. W. Zacharie, the sureties or guarantors of the payment of that debt, are, therefore discharged.

First point:

The account, as stated by M'Donogh and his receipt, and the notes of Relf and Zacharie, dated the 1st of July, 1829, constitute an agreement or contract relative to the Pemberton debt.

The account is a statement of what was then due on the Pemberton debt; it professes to be so.

In his receipt, M'Donogh speaks of it as a statement of the balance due and owing to him by John T. Pemberton. The receipt calls itself an arrangement between the parties.

The debt was due by Pemberton; had been assumed to be paid by Mrs. Zacharie; but it was neither the debt of Relf nor J. W. Zacharie.

The Pemberton debt was incurred for the plantation; the title to the plantation was not acquired by Relf and Zacharie; the engagement of Relf and Zacharie to pay that debt was collateral to the obligation of the real debtors of the Pemberton debt; we therefore, consider it fully established, that it was not the debt of Relf and J. W. Zacharie.

We must recognize it as a contract or agreement; there are obligations on both sides; Relf and Zacharie sign notes,

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The notes of Relf and Zacharie, express to be for value received. What is the value received? Had these notes passed into the hands of *bona fide* holders, this inquiry could not be made, but as the notes are in first hands, we are at liberty to inquire into the nature of the whole agreement.

It cannot be denied that it is an agreement; under what class of contracts this agreement ranks, will be inquired in the next head.

Second point :

The counsel of defendants has considered this contract as an independent contract of sale of the Pemberton notes, with a resolatory condition.

He treats the contract as *a sale* by M'Donogh to Relf and Zacharie, of the Pemberton notes and mortgage, but a sale liable to be dissolved by the non-payment of the price, viz : of the notes of Relf and Zacharie, like any other sale upon credit; that M'Donogh reserved and exercised the right to dissolve the contract of sale, and to foreclose the Pemberton notes and mortgage, and to prosecute his rights "the same as if this arrangement (the receiving by me the notes of Richard Relf and James W. Zacharie) had never taken place." That M'Donogh, having exercised his reserved right of recourse on the Pemberton notes and mortgage, the contract of sale of the 1st July, 1829, is resolved and dissolved, and is to be considered as if it had never taken place. Consequently, the notes of Relf and Zacharie should now be delivered up, for one party cannot be absolved from the contract, and another held to it; and he very consistently demanded that the amount of the first note which had been paid by Relf and Zacharie, should be refunded.

The following are the articles of the code on the resolatory condition: *Civil Code*, 2040.

"The dissolving condition is that which, when accomplish-

ed, operates the revocation of the obligation, placing matters in the same state as though the obligation had not existed."

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M'Donogh reserves the right, if Relf and Zacharie do not pay their notes, to dissolve the agreement, to foreclose the mortgage, and act as if the arrangement had never taken place.

It is contended that he adopted this alternative, dissolved the agreement and cannot now recur to it.

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The contract is certainly susceptible of this construction. It might be considered as a sale of the notes, on condition of payment of the price, as all sales on credit are.

M'Donogh might have enforced the contract against Relf and Zacharie, obtained a judgment, sold their property, imprisoned their persons, etc., but he chose to dissolve it and have recourse to his rights and remedies against the plantation.

But he cannot dissolve it and then ask for specific performance as he is now doing. Having exercised a right which he reserved on the footing of dissolving the contract, and treating as if it had never been made, he cannot now have recourse to it.

This is the strict legal view in which the contract is to be considered according to the very express terms of it, and of course it furnishes the defendants with a complete defence against their notes.

If Relf and Zacharie are to pay their notes, M'Donogh must give up to them the Pemberton notes, and as will be seen hereafter, he has precluded himself from doing so. If the contract is not thus to be viewed as a sale of the Pemberton notes, dissolved by M'Donogh for want of fulfilment of its conditions, the next inquiry is, to what other class of contracts does it belong.

It is of great importance accurately to determine the class of contracts to which any particular agreement belongs, for in that way only can the appropriate legal principles be applied to its obligations; and if we do not keep the appropriate legal principles of every contract in view in deciding on it, the ad-

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However inartificially a contract is made, it is not difficult to ascertain the proper class to which it belongs, if we regard substance, not form. Parties cannot make the contract of donation out of a sale, by saying that one gives land, and the other money, even if separate notarial acts be drawn with proper form of bonds.

Nor can a contract, in substance a partition, be made a sale; nor a sale, an exchange, etc.; nor can what is a contract of letting and hiring, by any form of words, be made a sale.

Let us examine what is the substance of the contract under consideration:

M'Donogh is the holder of Pemberton's notes, secured by mortgage on a plantation, which had been purchased by Mrs. Zacharie, who had stipulated to pay the notes of Pemberton. On the 1st July, 1829, they were all due. M'Donogh agrees with Relf and Zacharie, that if they will give their notes at from one to six years, bearing interest, for the amount due on the Pemberton notes, which bore interest, he will give the time, but expressly reserving the right to annul the contract and foreclose the mortgage, if any of their notes are not paid.

There is also an express agreement, that if Relf and Zacharie pay their notes, they shall be subrogated to the rights of M'Donogh on the Pemberton notes. Relf and Zacharie make this agreement and give their joint and several notes accordingly.

The question is, what is the nature of this contract; under what head of contracts is it to be classed.

Is it a sale, a loan, a pledge, a suretyship, guarantee, or what other denomination of contract.

If it be a conditional sale, we have seen it is dissolved, and defendants' notes must be delivered up to them.

Let us examine if it be not a contract of suretyship, a collateral or accessory contract, a contract to guarantee the payment of a debt due by a third person.

The counsel of M'Donogh admits in head No. 6, that there are two contracts ; one principal or main contract, and one collateral or accessory contract. He contends that Relf and Zacharie's notes or contract, is the principal or main contract, and the Pemberton debt is a collateral contract to secure the other. Let us test this question by the definition of principal and collateral contracts, *Civil Code*, 764.

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A principal contract is one entered into by both parties, on *their own accounts*, in the several qualities they assume. An accessory contract is made for assuring the performance of a *prior* contract, either by the same parties or by others, such as suretyship, mortgage and pledge.

Pothier defines the contract of surety, to be a contract by which a person obliges himself, on behalf of a debtor to a creditor, to pay him either the whole or part of what is due from such debtor, and by way of accession to his obligation.

It is on this point that the whole case turns. Under head No. 4, the counsel of M'Donogh says :

" Relf and Zacharie asked and obtained from the plaintiff, M'Donogh, a further prolongation of the time of payment, (*viz* : of the *Pemberton debt*.) of six years from that date, (*viz* : of the 1st of July, 1829,) on their giving their individual notes at one, two, three, four, five and six years, for the amount, with six per cent. interest for the time they had to run, making *themselves the principal debtors*, and leaving the old notes of Pemberton with the mortgage, as a security for their eventual payment."

In this passage the counsel of M'Donogh adroitly assumes the only point in controversy, *viz* : who were the principal, real, original debtors, which was the principal and which the collateral contract.

All persons who bind themselves jointly and severally, are considered in law as principal debtors in this sense of the word, that each obligor owes the whole debt, yet in the truth of things only one person may be the real debtor, and the other his sureties ; and if the sureties *in solido*, when called

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upon to pay, can show that the real debtor did not owe the debt, or owed only part of it, or has paid all that is due on the debt, the sureties are entitled to relief, being bound to pay only what the real debtor is bound to pay. This idea is fully expressed in article 2102.

If the affair for which the debt has been contracted *in solido*, concern only one of the co-obligees *in solido*, that one is liable for the whole debt towards the other co-debtors, who, with regard to him are considered only as his securities.

It is manifest that the word, co-obligés, is erroneously translated into co-obligees. The correct translation of this past participle is co-obligors; an obligee in English is the person in whose favor the obligation is made; an obligé in French is the person bound to fulfil the obligation, or what we call an obligor. The French have no corresponding *substantives* to our words obligor and obligee.

Pothier's language, No. 264, is: "If one person only profits by the contract, and the other is only bound *in solido* with him, for his accommodation, the person who has alone profited by the contract is the only debtor; the other, although a principal debtor as regards the creditor, is, as regards his co-debtor, with whom he is bound for his accommodation, only a surety for the principal debtor for whom he becomes surety."

It is the common case of an accommodation endorser, who is bound to the payee for the whole note, but is not bound at all if the maker be not bound, or has paid.

We say that Pemberton was the real debtor, and whatever sum Pemberton was bound to pay, Relf and Zacharie were bound to pay. If Pemberton, or those who engaged to pay his notes, have paid all that is legally due on these notes, the engagement of Relf and Zacharie is fulfilled.

We insist, that from the nature of the contract, and the terms of the agreement of the 1st July, 1829, the original or real debt always remained the debt:

1st. Of Pemberton, who made the notes in 1818.

2d. Of Erwin who assumed it in 1821.

3d. Of Mrs. Zacharie, who also assumed it in 1821.

4th. Of P. F. T. Zacharie, who, also, assumed it in 1830.

On the 1st July, 1829, it was the debt of Mrs. Zacharie's succession.

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By the agreement of 1st July, 1829, Relf and J. W. Zacharie, gave their personal guarantee for its payment, became bound as sureties *in solido*; entered into a collateral, accessory and auxiliary contract for its payment ; superadded their personal responsibility.

Relf and Zacharie bound themselves to pay the whole debt due by the purchasers of the Pemberton plantation ; they are sureties inasmuch as they only bind themselves to pay the debt due by *other persons*.

A principal debtor is usually understood to be one who has received the value and owes the debt *on his own account*. Any one who has not received value but from friendship or other collateral motives undertakes to pay the debt of another, is a mere surety or guarantor ; he accedes to a contract already in existence, and binds himself to fulfil it. Still he is only bound to pay the debt due by the real debtor, and no more. If, by any legal grounds arising out of the contract, the real debtor is discharged, the accessory contract becomes also extinct.

Let us criticise and examine the language of M'Donogh's agreement of the 1st of July, 1829.

1st. He acknowledges the receipt of Relf and Zacharie's six notes.

2d. He says, if Relf and Zacharie's six notes are regularly paid when due, " they will be in full payment to me of the *balance due* me on seven promissory notes, held by and *owing me* as above stated, *by John T. Pemberton*, and secured," &c.

3d. He says, said notes of John T. Pemberton being still in *my possession*, and *to be held by me* until the notes of Relf and J. W. Zacharie are paid, when they (*viz* : Pemberton's notes) are to be delivered up to Relf and Zacharie.

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4th. In case that Relf and Zacharie's notes are not paid, M'Donogh reserves the right of foreclosing the mortgage on Pemberton's notes as if the arrangement (viz: the receiving the notes of Relf and Zacharie) had never taken place.

Now, it does appear manifest, that if M'Donogh had at once given up the notes of Pemberton without reservation, for the notes of Relf and Zacharie, it would have been a sale of the Pemberton notes.

But he does not do so: either then it is a sale of the Pemberton notes, *on the condition* of the payment of the price, which sale M'Donogh has chosen to dissolve, because the price was not paid; which is the view taken of the contract by the senior counsel of Relf and Zacharie.

Or else, it is a contract of guarantee or suretyship, entered into by Relf and Zacharie, to guarantee and secure to M'Donogh the full payment of all that was or would legally be due and owing on the Pemberton notes.

And we would here again observe, that it is not in the power of parties by the use of words, to change the real and legal nature of contracts. If Relf and Zacharie had in so many words, said, we promise to pay M'Donogh the amount due on the Pemberton notes, and make ourselves principal or real debtors therefor, such words cannot alter the force and effect of the law; the debt would still have been the debt of Pemberton, and Relf and Zacharie would only have been sureties: for one who is, in the truth of things, only a surety for the debt of another, cannot, by words, change the nature of the contract, any more than contracting parties by calling a sale, where property is given and money paid for it, a donation, make it so; or make, what is in truth a partition, a sale, by the words they use.

M'Donogh might have sold the Pemberton debt of \$74,779 84 for what sum he pleased, and even in that case, as we shall hereafter show, if only \$40,000 was due on it, M'Donogh would have been liable for the deficiency, under *Civil Code*, article 2616: he who sells a debt or incorporeal right warrants

its existence at the time of the transfer, though no warranty be mentioned in the deed. EASTERN DIS.
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It is clear, from the language of the agreement, that M'Donogh never gave up his original debt and mortgage; he never assigned it or transferred it. He promised to do so, *if and when* Relf and Zacharie should pay their notes, reserving a right to dissolve the agreement if they did not comply with their engagement.

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If, then, it was not a conditioned sale of the Pemberton notes, which might be and was dissolved by M'Donogh, on account of the non-compliance on the part of Relf and Zacharie, the only other point of view in which the contract can be considered, is, that Relf and Zacharie became sureties or guarantors for the payment of those notes.

As we consider that the result of this suit depends on the legal character or nature of the agreement of the 1st of July, 1829, we must be permitted to illustrate the position, that Relf and Zacharie are only sureties, and to try the character of their liability by every test.

Suppose, that on the 1st of July, 1829, Pemberton's notes had all been paid, unknown to Relf and Zacharie, would Relf and Zacharie have been liable on their notes? Assuredly not; for if there was no subsisting debt due by Pemberton, the contract of the 1st of July, 1829, would be void. Suppose that Pemberton, or his assigns, under the purchase of the plantation, had brought a suit on the contract of sale, or when sued on the Pemberton notes by reason of redhibitory vices in the slaves, or deficiency in the quantity of the land, had struck off \$30,000 from the purchase money, viz: reduced Pemberton's notes that amount, or that Pemberton and subsequent purchasers had been wholly evicted, and had set up this defence, and been discharged from liability, would not Relf and Zacharie have been entitled to a like reduction on discharge from their notes?

Relf and Zacharie undertook to pay the sum due on the seven Pemberton notes; this was the sum and substance of the

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contract on their part, and the reducing it by calculation to a fixed sum on the 1st of July, 1829, did not bind them to pay that sum on the notes, if *so much was not due on them.*

Suppose there had been an error of calculation, and \$30,000 struck off on account of this error, would it not have reduced the liability of Relf and Zacharie an equal sum?

The mere fact of the claim being liquidated in figures on the 1st of July, 1829, did not bind them to that figured account, if, either in fact or in law, *that account was not due.*

As we have seen a release of Relf and Zacharie from their engagement, an agreement to surrender up and dissolve the agreement of the 1st of July, 1829, could not have diminished M'Donogh's claim on the Pemberton notes; but a release of the Pemberton notes or mortgage would have released Relf and Zacharie. Yet the counsel of M'Donogh affects to consider Relf and Zacharie as the principals, viz: real debtors, in contradiction to the affidavit of his own client.

It is again urged, if the contract of the 1st of July, 1830, be not a contract of surety, in which the debtor of the Pemberton notes, viz: the person who was bound to pay them, was the real debtor, and Relf and Zacharie were the sureties, there is no class of contracts to which it belongs.

Relf and Zacharie might not have been able to avail themselves of any defence, if their notes had passed into the hands of *bona fide* holders; but that would have arisen from the *form* of the *contract*, which was thrown into the shape of negotiable notes.

But so long as the notes remain in the hands of M'Donogh the original party to the contract, Relf and Zacharie stand, as to him, in the same relation as if they had signed a contract, binding themselves *in solido*, to pay to him the debt due by the debtor of the Pemberton notes. The Pemberton notes being in the hands of M'Donogh, were subjected to all the conditions of the original contract out of which they sprung. So, also, the Relf and Zacharie notes in M'Donogh's hands

must be subjected to all the conditions, events and qualifications of the agreement, which was the cause of their existence.

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If the debtor of the seven Pemberton notes has paid to M'Donogh all the money that is legally due upon them, the Belf and Zacharie notes are discharged; for what was all that Belf and Zacharie undertook and were legally liable for, by giving their six notes on the 1st of July, 1829. And as we shall hereafter find, all that was ever legally due upon the Pemberton notes has been paid M'Donogh.

3d. In obligations *in solido*, every obligor owes the whole debt; but, as between original parties to the contract, one debtor may be the real debtor, and the others his sureties. The payment by any one obligor, to the creditor, of all that is legally due on the debt, discharges the co-obligors as to the creditor, as before observed. This is only an enunciation of a text of the code, article 2102.

If the affair for which the debt has been contracted *in solido*, concerns only one of the co-obligors *in solido*, that one is liable for the whole debt towards the other co-debtors, who, with regard to him, are considered *only as his securities*.

The word co-obligees, as we have seen, is an erroneous translation of the French word *co-obligés*, which means co-obligors, which is clear from the idiom of the French language; also, from *Pothier, part 2, chapter 3, number 264*.

If any one co-obligor pays the debt, the rest are discharged as regards the creditor; and if it be the *principal or real debtor or himself*, who pays, the co-obligors are discharged altogether.

Who was the debtor of M'Donogh?

1st. Pemberton.

2d. Erwin, when he bought from Pemberton, agreed to pay his notes.

3d. Mrs. Zacharie, when she bought from Erwin, agreed to pay the Pemberton notes.

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4th. In 1829, the succession of Mrs. Zacharie was bound to pay these notes.

5th. In 1830, P. F. T. Zacharie, when he purchased the plantation, agreed to pay the Pemberton notes.

In 1829, Relf and Zacharie, in their *individual* capacities, as M'Donogh's counsel admits, agreed to pay this debt, a *debt not due by themselves*, but due by Pemberton and the succession of Mrs. Zacharie.

Relf and Zacharie thus became sureties *in solido*, for Pemberton and the Zacharie succession. In 1833-4, in a suit between M'Donogh and P. F. T. Zacharie, the amount of the debt due by Pemberton, and the Zacharie succession was liquidated at the sum of fifty-two thousand and twenty-eight dollars and sixty-three cents, and the whole of that sum has been paid to M'Donogh.

The whole object and agreement of Relf and Zacharie in giving their notes, was to pay the Pemberton notes and debt to M'Donogh.

All that was legally due upon the Pemberton notes has been paid; it follows that Relf and Zacharie's notes are discharged.

The counsel of M'Donogh says, that the suit was *in rem*. Admit it, but it must have been in consequence of the debt due by some present or previous owner of the *res*, who was the debtor, for whose debt the thing had been mortgaged. That person or the person who, succeeding to the title of purchaser, agreed to fulfil his obligations, was the real and true and actual debtor, and it was for the fulfilment of that obligation that Relf and Zacharie were sureties.

If the Pemberton debt was a collateral security for Relf and Zacharie's notes, when, and where, and how, and by whom was it made so?

Where is the agreement by which the owners of the Pemberton plantation bound themselves, or the Pemberton plantation, to pay the notes of Relf and J. W. Zacharie?

Which is oldest in point of time? How can the collateral debt exist before the principal debt? The inconsistencies of this assumption are endless.

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4th. In a litigation between the original parties to an obligation *in solido*, where there is a real debtor, viz: a debtor in his own right, and the others are sureties, the sureties are only bound to pay the amount of the real or principal debt, and may avail of any exception "*exceptions reales*" arising out of the contract, or a failure of consideration to reduce the debt.

The difference between exceptions or defences, growing out of the contract, and personal exceptions, is very clear.

Personal exceptions belong only to the person using them, as minority, coverture, insanity, etc. Real exceptions grow out of the contract, such as fraud, lesion, error in the contract, failure of consideration, redhibitory vices in slaves, eviction from the object of sale, etc.

In the brief of M'Donogh's counsel under the 8th head, it is said: "That the judgment of the Supreme Court, in the case of M'Donogh and Zacharie, 5 Louisiana Reports, relieved the third possessor from the obligation to pay interest, for reasons solely applicable to the position and rights of the parties, *resulting from the original contract with Pemberton*; nothing else was submitted by the pleadings; nothing else was embraced by the decree."

Under the 10th head, it is said, that the judgment of the Supreme Court, (which cut off thirty-six thousand dollars interest,) was founded on a technical or formal objection, which could only avail P. F. T. Zacharie.

The first passage admits expressly, that the defence on which the interest was reduced, "resulted from the original contract with Pemberton;" viz: is an *exception reale*. This is precisely what we contend for. The interest was to stop, if M'Donogh did not discharge the mortgages, and notify Pemberton, or his assigns, of the fact.

Mrs. Zacharie became not only a privy in estate, but a privy

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in contract to Pemberton, and also a party to the original contract. She bound herself to pay Pemberton's notes, and M'Donogh was party signing to this contract, and was bound to fulfil all its obligations to Mrs. Zacharie, and to every successor to the title of the plantation.

M'Donogh failed to fulfil the contract, he did not notify Mrs. Zacharie, nor her heirs, nor the purchaser, P. F. T. Zacharie, that he had cancelled the mortgages. His obligation to do so, resulted from his contract, and the benefit of his failure to comply with the contract extended to every assign of Pemberton, and more especially to Mrs. Zacharie, with whom he had expressly contracted in relation to it. The interest from 1824 was struck off, because of *his failure to comply with the obligation of his contract* with Pemberton and Mrs. Zacharie.

It is difficult to understand what is meant by that passage of the brief which calls the defence a technical one. A *technical* objection usually refers only to the form of the *remedy*. If it be meant to convey the idea, that the objection by which the interest was lost, viz: the want of notification of the cancellation of the mortgages, as stipulated by M'Donogh, was an objection personal only to Pemberton or his successors in title, we say the objection could be taken by Pemberton or his successors in title; and in fact, it was *successfully taken* by P. F. T. Zacharie in that capacity; but we say it could also be taken by the sureties to that contract of sale, because as is said in the eighth head, *it grew out of that contract*.

It was not what is called a personal exception, like minority, coverture, insanity, &c., which can only be taken by the minor, married woman, &c., and not by their sureties; but it is an exception arising *out of the contract*, out of the *stipulations made* by the vendor, which every successive vendee or his sureties may avail of. *Civil Code, 3029.*

Suppose that there had been redhibitory vices in the slaves, diminution or deficiency in the quantity of the land, eviction for want of title in the vendor, the original vendee, and every

successive vendee and their sureties could set up this objection and reduce or discharge the contract of debt, because the vendor, as part of his contract, is bound to warrant the slaves, the quantity of land and the title, to Pemberton and his assigns or successors, and the defence grows out of the contract; and as this exception grows out of the contract, it avails the sureties of the contract; and minority, coverture, &c., could not avail the sureties, because they are mere personal exceptions, which can only be used by the minor, married woman, &c. There was another exception which the counsel of M'Donogh does not notice, viz: that a large amount of the interest on the Pemberton debt was struck off, because that P. F. T. Zacharie, the successor of Pemberton, was disturbed in his possession by the suit of the heirs of Belly. See 5 *Louisiana Reports*, 254.

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This disturbance, under contracts made during the old code, page 360, article 85. Daquin et al. *vs.* Coiron, 3 *Louisiana Reports*, 409, puts a stop to the interest on the debt. This exception is one which arose out of the *law of the contract*, and availed Pemberton, and every successive vendee, and of course availed the sureties or guarantors of the vendee.

After all, it resolves itself again into the question, were Relf and J. W. Zacharie, by virtue of the contract of the 1st of July, 1829, sureties and guarantors of the Pemberton debt? If they were, as we think we have proved, then these exceptions by which \$36,000 of the interest was struck off, avail them as effectually as they *have availed* those who succeeded Pemberton in the title and in the obligation to pay the debt. We think we have made it appear very clear, that if Relf and Zacharie had paid their six notes, they would have been entitled to an assignment or transfer of the Pemberton notes and mortgage to themselves.

If, when called upon for payment of their notes, Relf and Zacharie had ascertained that M'Donogh, under whose control they were, had released the whole or any part of the Pemberton debt, such fact of release would constitute a defence to

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The surety is discharged, when, by the act of the creditor, the subrogation to his right, mortgages and privileges, can no longer be operated in favor of the surety. A release to the principal releases the surety.

So it is, if the creditor does any act, *or omits* to do any act, by which commission or omission the recourse against the real debtor is lost or diminished, the surety is discharged. *Principal and Surety*, 98 *Pothier*.

On a payment by Relf and Zacharie, M'Donogh was bound to assign to them the Pemberton notes and mortgage, with all the rights belonging to them, as secured by the contract.

In the winter of 1841, a re-argument of this case was ordered.

The case was then argued by *D. Seghers and G. Eustis, Esquires*, of counsel for the appellees, and by *Mazureau and J. R. Grymes, Esquires*, for the appellant M'Donogh.

Eustis, in the further argument, maintained the following points on the part of the appellees:

1. The main inquiry in this case is as to the character of the contract between the parties.

The nature of a contract depends entirely on the obligations it imports; its form is immaterial. The contract under consideration has every requisite of the contract of surety; *Code*, art. 3004; *Pothier on Obligations*, 365.

The law of suretyship appears to contemplate the case of the contract being modified by the various agreements of parties, which their convenience may suggest, but when *in point of fact* the contract is one of surety between the original parties, it holds them to the principles of the contract. "If the suretyship exceeds the debt, or is contracted on more onerous conditions, it shall be reduced to the conditions of the principal obligation;" *Code*, 3006, 3014; 2 *Pardessus, Droit Commercial*, No. 385.

The relations of the original parties to bills or notes may be changed by parol evidence; Chitty on Bills, 81. EASTERN DIS.
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If a bill or note is given in consideration of a pre-existing special contract, and that contract fails, is rescinded or satisfied, this fact will be a good defence between the original parties of the bill or note; Bailey on Bills, 342.

2. If this be not a contract of surety, it is incumbent on the opposite party to show to what class of contracts it does in fact belong, and our inquiries are not at all aided by its designation as a contract *sui generis*.

This contract strictly and technically is of that class of contracts known among the Romans as *pacta constitutæ pecuniæ*; Institutes, lib. 4, tit. 6, sec. 8 and 9; ff. 13, tit. 5, laws 1, 19, *id quod Gloss.* p. 9, z: Code 4, tit. 18; Sententiæ Pauli, lib. 2, tit. 2; Pandects by Pothier, vol. 5, p. 494; Pothier on obligations, following 456, sec. ix., not in use at present; Toullier, vol. 6, No. 396; Règles de droit, 227.

The pactum constitutæ pecuniæ is a contract of surety; Henneccius ad pandectas, lib. xiii, tit. vi, sec. civ; Voet ad Pandectas, lib. xiii, tit. vi, sec. 14, ff. lib. xiii, tit. v; 19 de pecuniâ constitutâ Gloss.

The reduction of the Pemberton debt by the judgment in the case of M'Donogh vs. Zacharie, was from a cause not personal to the parties but inherent in the debt itself; to wit: the omission on the part of M'Donogh to perform a condition without which judgment the debt was not demandable. This defence is available to sureties; Code, 3029; Pothier, 380.

A consequence which follows from the judgment and satisfaction of the Pemberton debt is that it is no longer in the power of M'Donogh to subrogate Relf and Zacharie to his rights as a creditor of the Pemberton debt; that debt having been extinguished, and if by a less sum than its nominal amount the reduction was in consequence of an omission or *laches* of the creditor. The case of Galy, Sirey, Reports of the Court of Cassation, 30, 2, 59; Theobald, law of principal and surety, Nos. 174, 175 and 176.

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It is immaterial whether the fund held by the creditor as security was received by him before or after the contract. L'article 2039 C. Civ., portant que la caution est déchargée lorsque la subrogation aux droits hypothèques et privilèges du créancier ne peut plus par le fait du créancier, s'opérer en faveur de la caution, s'applique même au cas où les droits ou hypothèques n'avaient été acquis par le créancier que postérieurement au cautionnement; case of Dumesnil, Dubuisson, 18th March, 1828; Sirey, 28, 2, 121; D. 26, 2, 76.

The principal debtor in an hypothecary action is virtually a party to the proceedings instituted against a third possessor of the mortgaged property who is personally bound for the debt. The want of a formal citation does not prevent him from being in law bound by the judgment rendered between the creditor and the third possessor; Phillimore's Ecclesiastical Reports, 243.

The judgment in the case of M'Donogh vs. Zacharie is *res judicata* as to the amount of the principal debt, and no more than that sum can be required of Relf and Zacharie under the satisfaction of that judgment, which has extinguished the Pemberton debt; x Toulner, 202, 209, 210.

8. Contracts of this description, that is, those in which heirs or persons in a representative capacity assume *under new titles and other forms*, obligations to which originally they were not parties, have received a construction which may be almost considered as conclusive upon the court from the high authority by which it is sustained; the rules on this subject support the views previously taken; Pothier on Obligations, sec. 19, chapter de constitutâ pecuniâ, No. 744; Louisiana Code, 3251, 3252 et seq.

In the case of M'Donogh vs. Zacharie, before cited, this court says, "Neither in our opinion does the circumstance of partial payments having been made, raise such a presumption of knowledge on the part of the vendees as to dispense the vendor from his obligation to communicate the fact of cancelling before he could enforce these obligations to pay."

If a payment of the sum stipulated or part of it, did not discharge the vendor from his obligation nor prevent the interest from having been due or demandable, those consequences cannot be attached to a mere accessory assumpsit on the part of persons who were not privy to the original contract.

On these grounds the counsel for the defendants maintains that the judgment of the District Court must be affirmed.

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On consideration of the case, the court propounded the following questions, to the counsel on both sides, to be answered in writing:

Simon, J. After a full investigation of all the points submitted to our consideration, we find it necessary to request the counsel to give us their views in writing on certain questions which we consider very important in this cause, and which in the last argument were not in any manner investigated on either side; to wit:

1. Were the notes which are the subject of this controversy given *through error* on the part of Relf and Zacharie, for the whole amount of the account marked A, and under the belief that M'Donogh was *legally* entitled to claim of the succession of Mrs. Zacharie, the interest included in his said account? or were they given as the result of a compromise?

Or in other words:

2. Would Relf and Zacharie have given those notes for the amount of said account, if they had known or been aware that M'Donogh's claim against the succession, as liquidated by the judgment of this court in 5 *La. Rep.*; 255, could not *legally* amount to more than \$52,028 63? Did they act under the impression that the interest was *legally* due, or did they intend, under the circumstances of the case, to make a compromise with M'Donogh, from which the succession they represented was to derive an advantage?

3. If Relf and Zacharie did not act in the view of an advantageous compromise, and were laboring under an *error of law*, (and perhaps of fact) when they consented to give their notes

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contained in *art. 1840 of the La. Code?*

4. If the plaintiff could not *legally* claim the interest included in the notes; was not the interest *morally* due by the succession?

Let the above case be re-argued in writing on the foregoing questions only.

These questions were responded to at great length by *Mr. D. Seghers, Mr. Eustis, and Judge Watts* for the appellees.

Mr. Mazureau and Mr. Grymes replied in elaborate arguments on the part of the appellant.

The judges being divided in opinion, the majority pronounced the following judgment:

Simon, J. delivered the opinion of a majority of the court,

In the first of these consolidated causes, the plaintiffs claim the reimbursement of the sum of eight thousand nine hundred and eighty-seven dollars, which is the amount of a promissory note of hand by them paid to the defendant, which, together with five other notes, amounting altogether to *ninety thousand three hundred and ninety-three dollars and twenty-eight cents*, are alleged to have been executed without a cause, the petitioners not having received any consideration for the same; they also pray that the said five notes be cancelled and returned to them.

In the second, the plaintiff seeks to enforce the payment of the balance due on the said five notes, which, as he states, after allowing all past credits and payments, amounts to *thirty-six thousand seven hundred and ninety-six dollars and twenty-two cents*, for principal and interest on the same, according to an account filed with his petition.

The issues between the parties are: on the one hand, a general denial of the allegations contained in *R. Relf and James W. Zacharie's* petition; and on the other hand, an averment that

the debt for which the notes sued on were subscribed, has been settled and liquidated by a judgment of this court, rendered on the appeal of a judgment of the court of the fourth judicial district, in the suit of M'Donogh *vs.* P. F. Theodore Zacharie; that the amount awarded by the said judgment of this court to John M'Donogh was afterwards paid to him by James W. Zacharie, whereby the debt was extinguished; and that consequently the notes sued on are without consideration.

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There was judgment in the inferior court in favor of Relf and Zacharie, cancelling the five notes sued on by M'Donogh; from which judgment, the latter appealed.

This case grows out of a transaction which took place on the 1st of July, 1829, between the parties to this suit in relation to the debt due to John M'Donogh by the succession of Madame Zacharie, deceased, which debt originated in the sale of a plantation and slaves from the said M'Donogh to John T. Pemberton in the year 1818. The principal facts relative to the origin of the said debt, and to the liability assumed by Madame Zacharie, after whose death the property mortgaged was sold to Theodore Zacharie, who also assumed the payment of said debt, are fully stated in the case of *M'Donogh vs. Theodore Zacharie*, 5 *La. Rep.*, 247.

The additional facts of the case, as shown by the record, are these: The defendants, Relf and Zacharie, were testamentary executors of Madame Zacharie; Relf having married two of her daughters, represented two portions of her succession, and James W. Zacharie, one portion. On the 1st of July, 1829, M'Donogh communicated to them a detailed statement of the amount due him on the original Pemberton debt and mortgage, which after allowing several credits, left a balance in his favor of *seventy-four thousand seven hundred and seventy-nine dollars and eighty-four cents*; for this sum, he received the six joint and several notes of Relf and J. W. Zacharie, including interest at six per cent. up to the expiration of the instalments, and forming the aggregate amount of \$90,363 28, and gave them the following receipt: "Received of Messrs. Richard Relf and

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statement signed by me, for the above amount (\$74,779 84) including interest at the rate of six per cent. per annum, until due, which six notes, as above set forth, if regularly paid, when they respectively fall due and are payable, will be in full payment to me of the balance due me on seven promissory notes, held by and owing me (as above stated) by John T. Pemberton, and which are secured by mortgage on a plantation and slaves, situated in the parish of Iberville; said notes of John T. Pemberton being still in my possession, and to be held by me until those notes of Richard Relf and James W. Zacharie are first paid, at which time I promise and engage to deliver them up to said Richard Relf and James W. Zacharie; but in the event that said notes of R. Relf and J. W. Zacharie, or either of said notes, are not regularly paid on the day they shall fall due, then I shall be at liberty to seek payment of John T. Pemberton, of the whole amount of his notes and *the interest due thereon*, in money, by foreclosing the mortgage given for the securing the payment of the said notes of John T. Pemberton, or in any other manner which I may see fit and proper, the same as if this arrangement (the receiving by me the notes of R. Relf and J. W. Zacharie) had never taken place. New Orleans, July 1st, 1829. (Signed,) John M'Donogh."

The first of these notes (\$6987) was regularly paid at maturity, and its amount was imputed by M'Donogh as a credit on one of the notes of Pemberton. In May, 1831, the first of these consolidated causes was instituted by Relf and Zacharie against M'Donogh, and in June, 1832, the latter instituted an action of mortgage against Theodore Zacharie to recover the amount of the Pemberton debt in principal and interest; the assumption on the part of Theodore Zacharie to pay said debt is recited in the petition, and this is the same case reported in 5 *La. Rep.*, 247, in which M'Donogh's claim *was reduced to* \$52,028 63; this court rejecting a large portion of the interest claimed by the plaintiff. This judgment was subsequently executed, and James W. Zacharie, having become the pur-

chaser of the property mortgaged, at sheriff's sale, on the 2d of September, 1833, furnished his twelve months bond, which was regularly paid on its becoming due, and on the 5th of September, 1834, John M'Donogh gave him a full acquittance of the debt and released all the mortgages existing on the property, by a notarial act, in which we find the following declaration: "Whereas true and faithful payment has been made by James W. Zacharie of a certain bond of \$52,028 63, &c., &c., now, therefore, in consideration of the full payment and satisfaction of the said bond as aforesaid, the said M'Donogh further declared, that he does by these presents cancel and annul the general mortgage, resulting in his favor from the said bond, and *as the amount of said bond, formed agreeably to the judgment of the Supreme Court, rendered in the above suit,*

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THE BALANCE DUE ON THE SUM OF ONE HUNDRED AND THIRTEEN THOUSAND DOLLARS, secured by a special mortgage in his favor, executed before Michel de Armas, late a notary public in this city, on the 23d of January, 1818, he, the said M'Donogh, further declared, that he also hereby cancels and annuls the said special mortgage existing on said plantation and slaves, as aforesaid, as well as all the reversions thereof, assumed first by Joseph Erwin, by an act passed before the said De Armas, on the 27th of March, 1821; second, by the late Mrs. widow Zacharie, by an act passed before the same notary on the 10th of October, 1821; and third, by the said P. F. T. Zacharie, in his act of purchase of the said plantation and slaves, from the succession of the said widow Zacharie. He, the said M'Donogh, authorizing and requiring the recorder of mortgages in and for the said parish of Iberville, to erase the said general mortgage, as well as the said special mortgage and all the reversions thereof, as aforesaid, from his books, as fully as need or can be by virtue of these presents." In March, 1836, the second of these consolidated causes was instituted to recover the balance due on the notes of Relf and Zacharie, after imputation of the amount received from James W. Zacharie, which balance forms the difference between the sum awarded by the

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This case has been ably and elaborately argued on both sides; the oral and written arguments of the counsel, have afforded us all the light which could be thrown on the important questions submitted to our consideration; they are not free from difficulty, and in coming to the conclusion which I have adopted, I apprehend that we have been in some measure prompted by a strong sense of legal and moral equity, and that I have perhaps given more effect to the views which I entertain on the true intentions of the parties, than to a strict application of the rules of law that may govern the form of their contract.

Under the circumstances of the case, it does not appear to me that the notes sued on were the result of a compromise, and that the defendants were under any moral obligation to pay to the plaintiff, a sum of money which he had no right to claim against the estate of Madame Zacharie; nay, such questions are not even presented by the pleadings, and no evidence has been adduced to sustain them. It is true that being interested in the succession, and having the management of the affairs thereof, as executors, their reasons and motives, in signing the notes, may have been derived from a strong desire to bring the estate to a fair and amicable settlement with the creditors, but they did not obligate themselves as executors or as the agents of the heirs, and I cannot presume that they ever intended to bind themselves for more than the succession really owed, and contract a debt which would be disavowed by the other heirs, and for which they could not exercise any recourse against the succession or against the property mortgaged to secure it.

What was the nature of the obligation contracted by Relf and Zacharie towards John M'Donogh? Pemberton was the

principal debtor of the notes which he had given for the purchase of the plantation and slaves, and the amount of said notes, or the balance due thereon, was secured by a special mortgage on the property. Madame Zacharie subsequently assumed the payment of the original Pemberton debt, as a part of the price of her purchase from Erwin; M'Donogh without discharging Pemberton, accepted her said assumption, and she became thereby personally liable to pay the same debt; after her death, the mortgaged property was to be disposed of to satisfy the debts of the estate, and it became necessary to liquidate the amount due to M'Donogh, and perhaps to give him an additional security for the whole of the debt, in order to be able to sell the property on credit; this object was to be attained not only for the benefit of the estate, but also for the advantage of M'Donogh, who thereby obtained the liquidation of his claim, and the personal obligations of two solvent persons as an additional security; in this state of things, he consented to take the notes of Relf and Zacharie, but he took good care to stipulate that *his rights should be preserved* against the original and principal debtor. Now, can it be believed that Relf and Zacharie ever intended to get M'Donogh's consent to their selling the property on a credit, at the enormous sacrifice of a sum amounting nearly to forty thousand dollars? The advantage which the plaintiff was to derive from the arrangement, was at least commensurate with the benefit which was expected from a sale on credit. The receipt speaks for itself; it shows clearly that the defendants were under the impression that M'Donogh was entitled to the whole amount of the interest by him claimed; since, far from giving any direct and positive consent to the terms of credit on which the property had been or was to be sold, he expressly reserved his right, in the event of the notes not being regularly paid, to proceed against Pemberton and the property, for the recovery of the whole amount of his notes *and the interest due thereon, as if the arrangement (the receiving by him of Relf and Zacharie's notes) had never taken place.* His object was to lose no part of the debt which

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was really and legally due him by Pemberton; but nothing shows that it was to be increased beyond its legal operation, and surely, if Relf and Zacharie had intended to give him what he had no legal right to claim, this would have been shown by the receipt itself. As it is, I cannot presume they did, and I feel morally convinced that the account furnished by M'Donogh, showing the balance which he pretended to be owing to him by Pemberton and by the succession, was taken as the basis of the settlement, and that the notes were made accordingly.

The obligation of the defendants is, in my opinion, in the

Where persons representing a succession, executed their notes to the creditor for the original debt due by it and secured by mortgage, their obligation is in the nature of the *pactum constitutæ pecuniæ*, engaging their personal liability, that the debt should be paid within a certain time, or the creditor be at liberty to seek payment according to his original right, on his mortgage.

nature of the *pactum constitutæ pecuniæ* of the Roman law, which *Pothier on obligations*, vol. 1st, p. 363, *du pacte constitutæ pecuniæ*, sec. 1, defines to be, *une convention par laquelle quelqu'un assignoit à un créancier un certain jour ou un certain temps dans lequel il promettoit de le payer*; and which promise sec. 2, *peut être faite à son propre créancier ou au créancier d'un autre*. Indeed, it would be difficult, if not impossible, to bring this contract under any other denomination and from the features of the arrangement, it cannot be doubted that the parties never intended to bind themselves in any other way, that is to say, that the object of Relf and Zacharie was merely to engage their personal liability that the debt due to M'Donogh should be paid at certain times fixed by their notes, with the condition, that if the promise was not punctually complied with, he should be at liberty to seek his payment according to his original rights, and to enforce it against Pemberton and the mortgaged property before the expiration of the last instalment. It seems to me perfectly clear that this is the whole extent of the defendants' obligation, and that the manner in which it was contracted excludes the idea that any novation was intended, or that said defendants ever understood that they were to become personally bound as M'Donogh's sole debtors for more than the amount actually due him by the succession. "Il résulte,

If the new obligation be for more than was legally or actually due on

says *Pothier, loco citato*, sec. 6, *de la définition que nous avons donnée du pacte constitutæ pecuniæ*, qu'il suppose la préexistence d'une dette qu'on promet de payer à celui qui en

est le créancier. C'est pourquoi, si par erreur je suis convenu avec vous de vous payer une certaine somme que je croyois vous être due par moi ou par un autre; l'erreur ayant été depuis découverte, vous ne pouvez pas en exiger le paiement, le pacte étant nul, faute d'une dette qui en ait été le fondement. And in No. 21, he proceeds to say: *Il nous reste à observer que dans les titres nouveaux que passent des héritiers, et par lesquels ils s'obligent au paiement de ce qui étoit dû par le défunt, ils peuvent bien, à la vérité, selon les principes que nous venons de rapporter apposer pour ce paiement des clauses différentes que celles portées par le titre primordial; mais il faut pour cela qu'ils déclarent qu'ils entendent en cela innover au titre primordial; autrement tout ce qui dans les actes se trouve différent de ce qui est porté par le titre primordial, est présumé s'y être glissé par erreur; et n'est pas valable, la présomption étant que l'intention de ceux qui passent ces actes, est de reconnoître et de confirmer ce qui est porté par le titre primordial, et non d'y rien innover."* See also Pothier on obligations, No. 744, in which he establishes the doctrine that the recognition of a debt is always to be understood as relative to a primordial title, and that if the recognition admits that the party making it, is obliged further or otherwise than as the primary title imports, by producing the primary title, and showing the error which has slipped into the recognition, he will be relieved.

These principles are fully applicable to the present case, and when I consider that the plaintiff had *three debtors*, each owing the Pemberton debt, viz: 1o. the succession of Madame Zacharie. 2o. Relf and J. W. Zacharie; and 3o. Theodore Zacharie: who were all obligated and bound to pay the same debt, and who, according to *Pothier*, No. 33; *loco citato*, *en sont tenues chacune solidairement, en quoi elles ressemblent aux fidéjusseurs*, No. 415. That there is no evidence that the parties ever had in view any other debt but that proceeding from the sale to Pemberton; that nothing was said as to the interest which was supposed to be rightfully due to M'Donogh;

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the original one, the mistake being discovered the pact or new obligation is void, *pro tanto*, for want of a debt which was the foundation of it.

The recognition of a debt is always to be understood with reference to a *primordial title*; and if the party is obliged further, or otherwise than as the primary title imports, on showing the error he will be relieved.

EASTERN DIS. and that the extent of the obligation of Theodore Zacharie, under his general assumption, has been determined contradictorily with the creditor, by a judgment of this court: 5 *La. Rep.*, 247; in which the sum of \$52,028 63, was declared to be the balance due on the price of the property sold. I may fairly infer that if Relf and J. W. Zacharie had been aware that M'Donogh had no right to claim more than the amount awarded to him by the Supreme Court, they would not have consented to give him their notes in accordance with the detailed account by him produced at the time of the arrangement. It is true that they paid the first note, but this only shows the continuation of the error, and the circumstance of their having protested against the payment of the other notes, by instituting their suit to have them cancelled in May, 1831, (the case in 5 *La. Rep.*, was only decided in 1833,) indicates sufficiently that they discovered the error a short time after the payment of the said first note, and that they took immediate steps to have it corrected, long before said error was recognized by the decision of this court.

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So where R. & Z. being heirs of a succession and administering it as executors, gave their notes to the creditor by original debt and mortgage, who reserved the right to go upon his mortgage if the notes were not punctually paid, and did so after the payment of the first note; and in which the debt was ascertained by a judgment to be much less than the amount for which the new obligations were given: *Held*, that there was error for this amount, and the new obligations can have no effect.

According to the *art. 1818 of the La. Code*, "the reality of the cause is a kind of precedent condition to the contract without which the consent would not have been given, because the motive being that which determines the will, if there be no such cause where one was supposed to exist, or if it be fully represented, there can be no valid consent." Here the representations made by the creditor, by the production of his account, were that he had a right to claim the interest; he actually claimed them, and both parties may have believed at the time that they were justly and rightfully due; but those representations turned out afterwards to be unfounded, and there was no valid consent on the part of the defendants to the contract. By the cause of a contract is meant *the consideration or motive for making it*; *La. Code, arts. 1890, 1893*. Thus, if Relf and Zacharie were induced to sign the notes, because they believed that the interest carried in the account was due, there

was no cause or consideration, they were in error, and their EASTERN DIS.
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From the judgment of this court against Theodore Zacharie, it is clear that he was made *personally* liable to pay the debt of the estate, although the action was originally hypothecary; he was condemned to pay the whole amount which *the succession* owed to the plaintiff, and the reduction took place, not as the result of any personal right vested in Theodore Zacharie to have the debt reduced, but because in liquidating said debt, as against the estate, contradictorily with the creditor, it was found that Madame Zacharie did not owe him more than the amount awarded by the judgment.

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It is not necessary for me to inquire into the grounds and reasons which may have led this court to disallow the interest claimed by M'Donogh. It suffices to say that the decision has had its effect, and that Theodore Zacharie has been discharged from paying the amount of the interest, which, if due by the succession, he was bound to pay under his positive contract and assumption. He stood exactly in the place of the estate; he exercised the same means of defence which Madame Zacharie herself was entitled to oppose to M'Donogh's claim, and he succeeded. Suppose M'Donogh was to apply to the succession for the deficiency between the amount of the judgment and what he considered in July, 1829, to be the debt owing to him; could the succession set up the same claim against Theodore Zacharie who was bound to pay and hold it harmless against the debt? Surely not. If so, would not M'Donogh's rights, if transferred to Relf and Zacharie be affected and even destroyed by the judgment? Could he validly and effectually subrogate them to his rights? Could they enforce them against Theodore Zacharie? I think not; and it seems to me that, without attempting to decide that the judgment in question ought to have the force of *res judicata* in this case, it must be considered as sufficient to put M'Donogh in the actual impossibility of subrogating the defendants to the rights and securities which they would be entitled to,

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on paying the amount in controversy; and this is the result or consequence of his own omission and neglect. The judgment would undoubtedly be a bar to a recovery against Théodore Zacharie who had obligated himself to pay *the whole debt*; as against any claim set up under M'Donogh's rights, he would successfully oppose the plea of payment under the decision of this court in his favor. It is clear that said judgment, rendered contradictorily with the creditor, would protect Theodore Zacharie against any action brought against him for the same cause, and would be considered as a judicial declaration that the debt by him assumed did not amount beyond the sum awarded; and this sum has been satisfied. *Toullier, vol. 10, Nos. 202, 203, 204, 209 and 210.*

But the defendant himself has recognized that the sum of *fifty two thousand and twenty-eight dollars and sixty-three cents*, constituted the whole amount of his claim. His notarial receipt given to James W. Zacharie on the 5th of September, 1834, (about two years before the institution of this suit,) declares positively that the amount of the bond *formed the balance due him on the sum of one hundred and thirteen thousand dollars*, secured by a special mortgage, &c., &c. Can he now gainsay the contents of his receipt? Is he not forever precluded from claiming any sum beyond the said balance? Was not the interest, if due, secured also by the mortgage which he released? And again, could Relf and Zacharie, on payment of this interest, be now subrogated with any effect to the creditor's said right of mortgage? Undoubtedly not. His receipt contains no reservation; it is absolute; he discharges all the mortgages which he had on the property, as also *all the reversions thereof*, that is to say: the assumptions successively made by Joseph Erwin, Madame Zacharie and Theodore Zacharie, to pay the Pemberton debt. The principal debtors are all thereby released, and the debt and mortgages are all extinguished. This, it seems to me, is the stronghold of the defence; it grows out of the very issue, set up by the defendants; and it is, in my opinion, so conclusive that, alone,

it would be sufficient to defeat the plaintiff's pretensions. I therefore think that the judgment appealed from ought not to be disturbed. I EASTERN DIS.
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With regard to the claim of Relf and James W. Zacharie to the reimbursement of the sum of *eight thousand nine hundred and eighty-seven dollars*, as being the amount of the first note and which was paid, it has been shown that that sum had been credited on the principal debt previous to the institution of the suit against Theodore Zacharie. It is endorsed on one of the notes originally given by Pemberton, at the date of the 4th of April, 1830, and we must presume that it was accounted for in the liquidation of the balance due by Theodore Zacharie. There is no evidence that said sum was not included in the general settlement, and the defendants must have had a perfect knowledge of its application.

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This being the opinion of the majority of the court; it is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs.

Morphy. J. I fully concur in the foregoing opinion.

Garland. J. For the reasons stated in the opinion just delivered by Judge Simon, I am of opinion the judgment of the District Court ought to be affirmed with costs.

Bullard, J. dissenting.

I have not the good fortune to agree with a majority of the court, in the conclusion to which they have come, and I proceed very briefly to set forth the grounds of my dissent.

I assume in the first place, what will not be controverted, that the judgment of the Supreme Court in the case of *M'Donogh vs. Zacharie*; (5 La. Rep., 247,) has not in this case, and between these parties, the *authority of the thing adjudged*. And, secondly, that the notes in question were given for a consideration which renders them obligatory on the defendants, unless they show error originally when they were given; or a subsequent discharge or release. They were given by persons who stood in the relation of heirs or executors

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of Madame Zacharie, who was personally liable for the whole of the Pemberton debt. They had personally a deep interest in the matter, in order to save the property in the family after having made large payments and to gain further time.

The notes included the whole balance of the Pemberton debt assumed by Madame Zacharie, with arrearages of interest, according to the terms of the contract, and interest added up to the time the notes were to fall due. The whole were blended together, without inquiring whether Pemberton could shelter himself from the payment of any part of the interest behind the mere verbiage of a notary, without inquiring whether authentic evidence of the release of a mortgage in the proper office, which is notice to the whole world, was not also notice to Pemberton. One of the notes was paid; that is to say, a part of the interest and a part of the principal. It will not be pretended that the notes were without consideration; and, in my opinion, the makers can escape from the payment of them only by showing that they were given in error; or that they have been since legally exonerated from their payment.

I. The judgment in the case of M'Donogh vs. Zacharie, does not show that error. Madame Zacharie never stipulated for personal notice to herself. She had paid large sums; twelve thousand dollars paid by her were imputed to the Pemberton note due in 1824, and more than eight thousand dollars to that due in 1825: Besides, when she purchased and

Bullard, J. and Martin, J., dissenting.—
The failure to give notice of the extinguishment of a mortgage, did not forfeit accruing interest; it only authorized a suspension of the payment. Interest still runs in such a case, although not exigible.

assumed to pay Pemberton's debt, she must be presumed to have engaged to pay the interest as well as principal. According to the original contract the failure to give notice of the extinguishment of the mortgage, did not operate a forfeiture of the accruing interest. It only authorized Pemberton to suspend and refuse the payment; and we held unanimously in a very recent case, that the interest still runs in such a case, although not exigible. I leave to those who were members of the court at that period to speak of that judgment. It would not become me to say it was erroneous and not founded in sound principles. It is enough for my purpose that it is not in this case

res judicata; and therefore not conclusive as to the rights of the parties now before us.

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The notice of release of mortgage was to be given before the payment in March, 1824. After that time upwards of twenty thousand dollars were paid, and on discovering at that time that Pemberton had not been notified, could she have recovered back any part either of the principal or interest? I think not, because being originally a stranger to the primitive contract she must be considered as having notice, not having required personal notice herself, and having paid according to the terms of her own contract as well as Pemberton's she must be regarded as having waived notice. She paid what was morally due, interest on the price of property producing revenues. She purchased also long before M'Donogh was obliged to give the notice to Pemberton; she assumed to pay his debt; that stipulation was accepted by M'Donogh; Pemberton was no longer interested in the contract; he was laid entirely aside. This was in 1821; and yet Madame Zacharie pretended that Pemberton was to have notice in 1824; and because he was not hunted up, after parting with all his interest, and formally notified of the release of the mortgage, she and her estate are to gain twenty-four thousand dollars.

It is said that the engagement of Relf and Zacharie to pay the debt of Madame Zacharie is the *pactum constitutæ pecuniæ*. Be it so. "If it be of the essence, says Pothier, of the *pactum constitutæ pecuniæ*, that there should be a pre-existing debt, it is only because it ought to have, for its object, a payment without which it would embrace a donation. Now in order that this pact should not contain a donation and that it should have a payment for its object, it suffices that the debt, the payment of which is promised, should be due, at least *in foro conscientiæ*; and that there should exist consequently a just subject for payment; although it may be *in foro legis* declared null by the civil law;" Pothier on obligations, vol. 2, page 369. Now I ask, was not Madame Zacharie bound in conscience to pay the interest as well as the principal? Was

If it be the essence of the *pactum constitutæ pecuniæ* that there should be a preexisting debt, it is only to avoid a donation; but it suffices if the debt, the payment of which is promised, should be due *in foro conscientiæ*; and that there should exist a just subject for payment, although it may be *in foro legis* declared null.

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there any conscience in setting up as an excuse for not paying at all, that Pemberton had a right to suspend the payment, if notice was not given to him of the release of the mortgages? Admitting that upon mere technical grounds, *in apicibus juris*, M'Donogh could be deprived of a large amount of his interest which arose *ex mōrd*, would any court, governed by principles of equity, have decreed him to refund it, if it had been paid. Even usurious interest paid cannot be recovered back. But she had paid after the time for giving notice had arrived; she did not insist upon the condition; a part at least of two installments of the Pemberton notes were paid. Was that not her construction of the contract? No lawyer would hazard his reputation by suing to recover back for Madame Zacharie those payments, on the ground of a want of notice to Pemberton, when she alone had any interest in being informed of the discharge of the mortgages.

The agreement of M'Donogh, that on the payment of the notes given by the defendants, he would surrender to them the Pemberton notes, means nothing more, in my opinion, than that he would put it in their power to cause all mortgages to be raised. He reserved the right of proceeding on his original mortgage, but this means nothing more than that no novation was intended. The debt due by Relf and Zacharie was greater than Pemberton's by the addition of interest; Relf and Zacharie cannot now complain that the Pemberton notes have not been given to them; they prevented compliance with that agreement by not paying their own notes. M'Donogh reserved the right to go upon the mortgaged property, but nothing shows any intention in that event to release the defendants.

II. I have had more difficulty on the question growing out of M'Donogh's discharge of the twelve months bond, than any other arising in the case. He admits by way of recital, it is true, that the amount of the bond, to wit: \$52,000, was, *according to the judgment of the Supreme Court*, the balance due. He acknowledges to have received the amount of the bond, releases the mortgage and reversions of mortgages assumed by

Madame Zacharie. Those expressions I do not understand and cannot give to them the effect of releasing Relf and Zacharie from the payment of their notes; their *pactum constitutæ pecuniæ*; because, in my opinion, they and Madame Zacharie and her heirs are bound in conscience to pay the whole interest as well as capital, notwithstanding the success of this technical defence.

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If it be true, as taught by Pothier, that the *pactum constitutæ pecuniæ* be valid although the debt which forms the object of it, be not recoverable in strict law, I cannot understand how M'Donogh's acknowledgment, that he had received the amount of a twelve months bond, which according to the judgment of this court formed the balance due by Theodore Zacharie, could exonerate Relf and Zacharie from the payment of such part of their notes as would make up to M'Donogh, what they admitted was the balance due him.

My opinion is, the judgment should be reversed and judgment entered for the plaintiff.

MARTIN, *presiding judge*; concurred in the above opinion.

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APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where notes, given for the price of property, producing fruits and revenues, are by agreement or otherwise, to remain deposited and payment suspended, until certain defects in the title are cured, on their restoration, payment of the interest arising *ex morâ* will be decreed, as a compensation for the fruits of the thing sold, when it remained in the enjoyment of the vendee.

The purchaser who wishes to relieve himself from the payment of interest must avail himself of the faculty given him to *deposit the price* due by him.

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Where the purchaser is actually disturbed in the possession and enjoyment of the thing sold, he can require security before payment of the price can be demanded.

The defendants in this case had given their notes for a large property called the "Rope Walk," in New Orleans, belonging to the Balls, and sold by them to effect a partition. It was alleged there was a defect in the title of one of the late owners and that her interest had not been legally divested. The notes of the purchasers were deposited in court to await the perfection of the title in all respects, but in the meantime the purchasers were in possession. See the case 15 La. Reports, 173. On the decision of the suit and when the title was declared valid the plaintiffs demanded payment of the notes, which had been temporarily suspended, *with interest from maturity*.

The defendants resisted payment and especially *interest*, because the title was supposed defective, and the payment of the notes suspended until it was declared valid.

2. That they were disturbed in their possession by the claim of a third person. The record of a suit in the parish court was produced in evidence, showing an actual disturbance.

There was judgment for the plaintiffs for the amount of the several notes given by the defendants but *without interest*; and that execution be stayed until the plaintiffs pass an act of sale for the share in the property sold belonging to Clarissa Ball, *an insane* and interdicted person; and until the plaintiffs give security according to the article 2535 of the La. Code, against the claim of J. M. Hall, set up to the property, &c., in the sum of \$36,000. The plaintiffs appealed.

Preston, for the plaintiffs.

L. Janin, for the defendants.

Bullard, J. delivered the opinion of the court.

Two questions only have been presented for our solution in the present case. 1st. Whether the defendants are liable to pay interest at five per cent. from the maturity of their notes given for real estate, under the agreement between the parties, that

the notes were to remain in deposit until certain defects in the title should be cured, and particularly since the defendants were disturbed in their enjoyment of the property bought, by their suit with Oakley or Hall; and 2dly. Whether the disturbance be such as authorizes them under the provisions of the Code to withhold payment until security shall be given by their vendors.

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1. In order to understand the first ground and to appreciate justly the arguments of the defendants' counsel in support of their claim to be exonerated from the payment of legal interest arising *ex mora*, it becomes necessary to recapitulate the principal facts which led to the present controversy as shown in the case of Ball *vs.* Ball, 15 La. Reports, 173. The defendants, who had purchased the Rope Walk, having discovered that a portion of the property belonging to one of the heirs of Ball, who was *non compos mentis*, had been sold irregularly, and that there still existed a mortgage for upwards of twenty-one thousand dollars in favor of the heirs of R. Ball, declined at first to pay, but it was agreed that the cash part of the price should be paid at once, but that the notes to be given for two-thirds should remain deposited in the Bank of Louisiana, until those defects in the title should be cured. It was afterwards agreed, however, that the purchasers should retain one-third of the price as their security until the vendors should have complied with their engagement to perfect the title. The vendors having taken such steps as they considered sufficient for that purpose, took a rule on the defendants to show cause, why the notes thus deposited should not be delivered to them. That rule was made absolute by a judgment of the District Court which was afterwards affirmed on the appeal. The notes were thereupon given up, and having been protested for non-payment, the present action was brought to recover their amounts together with interest at five per cent. from maturity, on the ground that they were given for real estate.

It is argued by the defendants that according to the last agreement it was clearly the intention of the parties, that the

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time of payment of the notes should be extended until after the decision of the Supreme Court, and that if it had been intended at the time that the notes should be paid at maturity the parties would have selected a bank which pays interest upon its deposits, and the agreement would have specified the notes and their proceeds when paid. That even if the notes had been paid at maturity the plaintiffs would have received no interest, because they were deposited in a bank which pays none upon deposits. The plaintiffs are therefore not injured and it was immaterial to them whether money or notes were deposited.

Where notes, given for the price of property, producing fruits and revenues, are by agreement or otherwise, to remain deposited and payment suspended, until certain defects in the title are cured, on their restoration, payment of the interest arising *ex morâ* will be decreed, as a compensation for the fruits of the thing sold, when it remained in the enjoyment of the vendee.

It appears to us that the agreement of the parties did not modify essentially the contract between them. It restrained the negotiability of the notes, and suspended the obligation to pay and the right to coerce payment until after the decision of the court upon the title. To deduce from the agreement *alone* an intention on the part of the plaintiffs to take back the notes after the court should have decided, without the right to claim the interest which may have accrued in the mean time *ex morâ*, as a compensation for fruits of the thing sold, which continued to be enjoyed by the defendants, would be a forced construction of the agreement, in which no allusion is made to interest, and would seem to militate against the maxim, "*nemo facillè presumitur donare.*" On the contrary, it would seem but just, that whenever the restoration of the notes was decreed, they should revert to the vendors undiminished in value or amount, as if they had never been out of their possession. We cannot see in the tenor of the agreement any expression which would authorize us to conclude that the plaintiffs were not to be paid ultimately the interest as well as principal, in the event of the defects of title being cured to the satisfaction of the court.

So far as to the agreement of the parties; but how does the matter stand under the law which authorizes the buyer to withhold payment in case of disturbance unless security be given?

If this question were to be settled in the present case with

reference to the provisions of the Code of 1808, it cannot be denied that several decisions of this court fully sustain the pretensions of the defendants to be exonerated from the payment of interest accruing during the existence of the disturbance and while the obligation to pay was suspended. Besides the case of *Miles vs. Oden*, in which it was held that the debtor for a number of slaves, who was a stakeholder, was not bound to pay interest during the contest between an attaching creditor and an assignee of the original creditor, because not in *morá*; (8 Martin, N. S., 214,) we have that of *Jiovellina vs. Minor et al.*, (1 La. Rep., 76,) in which the doctrine was recognized, but in that case it was shown that the money had been tendered as soon as due. But the court says that "after the day of judgment if the debtor be prevented, by the act positive or negative of the creditor, or if the latter withdraw or conceal himself, the debtor is not in fault and owes no interest or damages. His obligation to keep the money ready to be paid on demand prevents him from parting with it to make it produce interest, except at his own risk." A previous case reported in the 6th Martin's Rep., 657, that of *Boatong vs. Ducommon*, is still stronger to the same effect. In the case of *Daquin et al. vs. Coiron*, 3 La. Rep., 409, the court says "we are of opinion that interest cannot be recovered on those sums which became due after the defendant was disturbed in his possession. The case comes entirely within the principle already decided in that of *Jiovellina vs. Minor et al.*, 1 La. Rep., 72. The vendor had no right to ask for payment until he tendered security, and until that was done the vendee was not in default for not paying." To the same effect was the case of *Rowlet vs. Shepherd*, 4 La. Rep., 95.

On the other hand, the decision of this court in the case, *Duplantier vs. Pigman*, 3 Martin's Rep., 245, is in favor of allowing the interest, and has, we cannot disguise it, been explicitly overruled in the cases above mentioned. The court says, "but in the present case, it is contended that interest ought not to be recovered because the buyer is not bound to pay the ori-

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ginal debt, until he be secured in his possession; and this objection appeared to the court to have considerable weight; however, on examining the law we find that it is the actual possession and enjoyment of the property which gives the right to the seller to claim interest, and that so long as the purchaser remains in possession he is bound to pay it on the price, unless he offer the money to the seller, and consign it for his use in case he refuses to receive it; it being considered unjust that the purchaser should at the same time enjoy both the price and the thing sold."

All these decisions were made with reference to the Code of 1808; the case now before us arose under the existing Louisiana Code, which contains some express provisions on this subject, besides those in the former Code.

Article 2531 declares that the "buyer owes interest on the price of the sale until the payment of the capital in the three following cases:

1. If it has been so agreed at the time of the sale.
2. If the thing sold produces fruit or any other income.
3. If he has been sued for the payment."

Article 2535 provides that the buyer who is disquieted in his possession or has just reason to fear that he will be disquieted by an action of mortgage or any other claim, may suspend the payment of the price until the seller has restored him to quiet possession, unless the seller prefer to give security; and the next article provides, that the seller who cannot receive the price from inability to give security, may compel the buyer to deposit the price, subject to the order of the court to await the decision of the suit. And article 2587, that the purchaser may also require the deposit, *to relieve himself from the payment of interest.*

To withhold or suspend payment does not necessarily imply a forfeiture of any part of the debt or of its accessories. The creditor who is unable to give security may require the deposit. He may require it to be made in a bank which pays interest on deposits. If he do not, and consents to leave it in the hands

of the debtor, the latter becomes a quasi pledgee, and being at the same time in the enjoyment of the property sold, it would seem should be bound in equity to pay the interest, which is a compensation for fruits, unless he in his turn chooses to relieve himself from the payment of the interest by depositing the price. It has been said in argument that the provision of the Code which authorizes the creditor to require the deposit, is arbitrary and confers a faculty which may be used oppressively; but it must not be forgotten that it is only the creditor unable to give security and who consequently cannot coerce payment, who enjoys this privilege. The provision appears to us a wise one. It enables the vendor to cause the money due him to be placed in a safe bank which pays interest on deposits and at the same time deprives the debtor of one motive for colluding with pretended claimants to the property sold, in order to put off the day of payment while he is in the enjoyment both of the thing and the price.

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We are of opinion that these provisions of the new Code have made the law to be as it was first understood and interpreted by this court in 1814, in the case of *Duplantier vs. Pigman*, and that the purchaser who wishes to relieve himself from the payment of interest must avail himself of the faculty, given him by the amendments of the Code, to deposit the price due by him. It is probable the juriconsults who prepared the amendments to the Code adopted this first decision as most consonant to general principles and made it the basis of their amendment of this part of the Code of 1808.

The purchaser who wishes to relieve himself from the payment of interest must avail himself of the faculty given him, to deposit the price due by him.

On the second point we concur with the court below that the disturbance shown is such as to authorize the defendants to require security. The evidence shows that it was an actual disturbance. A part of the land apparently embraced by the title of the defendants was advertised for sale as the property of Oakey or Hall. In this state of things we cannot enquire into the titles and decide which party will ultimately prevail. Only one of the parties is before us, and if both were, it would

Where the purchaser is actually disturbed in the possession and enjoyment of the thing sold, he can require security before payment of the price can be demanded.

EASTERN DIS. be improper to go into the merits of that controversy in the
July, 1841. present case.

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 HOLLIDAY ET AL.**

It is therefore adjudged and decreed that the judgment of the District Court be reversed; and proceeding to render such judgment as in our opinion ought to have been given below, it is further adjudged and decreed that the plaintiffs recover of N. B. Le Breton and P. A. Bost, in solido, the sum of \$16,005; of H. F. Deblieux and Louis Janin, in solido, the sum of \$6,005; and of H. F. Deblieux a further sum of \$12,002 50, with interest at five per cent. per annum from the time their notes fell due respectively on the amounts thereof: but it is ordered that execution be stayed until the plaintiffs shall have given security to the satisfaction of the District Court, according to article 2535 of the Civil Code, in the sum of thirty-six thousand dollars, to protect the defendants against the claims of J. M. Hall upon the property sold; and that the defendants pay the costs of both courts.

KENNER & CO'S SYNDIC vs. HOLLIDAY ET AL.

APPEAL FROM THE COMMERCIAL COURT OF NEW ORLEANS.

A third purchaser of an estate subject to certain mortgages, which she assumes to pay, cannot set up her claims in opposition to the mortgage creditor on said estate.

The creditors of an estate are not bound to give security to the purchaser before coming on him for their claims due by it, on the ground that he is in danger of eviction. The right to call on a party to give security implies a warranty against eviction.

A person contracting to pay the debt of another and receiving property out of which it was to be paid, cannot oppose the plea of usury or go into the consideration of that debt, and retain the means placed in his hands to pay it.

Usurious interest which has been paid cannot be recovered back.

Intervenors have no right to come in and contest the jurisdiction of the court in which the plaintiff had a right to sue. They must take the case as they find it, and if their interests are affected, it is the result of their own acts.

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This is an action to recover the sum of \$64,306, from Mrs. Maria Holliday, widow of the late John R. Holliday, on account of a debt due by him in his life time, to the firm of Wm. Kenner & Co., and for which he gave his notes in 1836, secured by mortgage on a large sugar plantation and slaves. Since his death the defendant became the purchaser of said estate, subject to this debt and mortgage, and also assumed payment with certain conditions as to an extension of time.

The plaintiff, Richard Relf, sues as the sole syndic of the creditors of Kenner & Co., and prays judgment for the amount of the debt, and enforcement of the mortgage.

The defendant admitted the execution of the notes and mortgage, by her late husband, but denied her liability in the manner and for the amount claimed. She then sets up several matters in defence.

This suit was instituted in June, 1835, and put at issue in January, 1836, and in January, 1838, the defendant, Mrs. Holliday, amended her answer and also intervened as tutrix of her minor son, Daniel C. Holliday. The suit remained on the docket without being brought to a trial, until the 23d January, 1840, when Maria Davis, wife of W. R. Taylor, and Eliza Davis, wife of Minor Kenner, intervened, alleging they are daughters and the sole heirs of Wm. Davis, deceased, who was the first husband of the defendant, their mother. That their father died in the parish of West Feliciana in 1819, leaving considerable property, which was inventoried; and that in 1821 their mother intermarried with the late John R. Holliday, when they were minors, without the advice of a family council, and the property held by them and her in common was by authority of the Court of Probates on the 5th April, 1822, adjudicated to their said mother, duly authorized by her husband, at the estimative value thereof, and for which she gave a special

EASTERN DIS. mortgage on 78 slaves; 59 of which belonged to herself, and
July, 1841. 17 to her husband, John R. Holliday. That she bound herself
KENNER & CO'S in the said act of mortgage to pay them on their arriving at the
 SYNDIC age of majority, the sum of \$29,614, with five per cent. inter-
 US. est thereon; this being the amount of the interest of their
HOLLIDAY ET AL. father in said estate.

They allege further that by the marriage of their mother without the consent of a family meeting, authorizing her to retain the tutorship of her minor children, that both her and her husband, John R. Holliday, became liable for the administration and eventual restitution of their property. They pray leave to intervene, alleging that they have a prior, special and legal mortgage to that of the plaintiff, or the Bank of Louisiana, also a creditor; and that the defendant be ordered to pay them out of the proceeds of the plantation and slaves purchased by her out of the estate of her deceased husband, John R. Holliday, by privilege and preference, the following sums, viz: to Mrs. Taylor, \$18,911, with interest, &c.; and to Eliza Davis, wife of M. Kenner, \$26,935 15, with interest, &c.

On these pleadings and issues the cause was tried. The case turned mainly on documentary evidence, exhibiting the respective claims, mortgages, and titles of the parties.

There was judgment for the plaintiff against the defendant, for \$64,306 51, with eight per cent. interest, &c.; and that the proceeds of the mortgaged property sold, &c., be paid over to plaintiff, and that in case of deficiency of funds to satisfy this judgment, that the residue of the mortgaged property be seized and sold to pay the same. That there be judgment for the plaintiff in the matter of the intervention of Mrs. Holliday as tutrix of D. C. Holliday, dismissing it; and also against the intervenors, Mrs. Taylor and Mrs. Kenner; they paying the costs of their respective interventions.

The defendant and all the intervenors appealed.

Eustis, for the plaintiff and appellee.

L. Janin, for the appellants.

Garland, J. delivered the opinion of the court.

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Richard Relf, syndic of the creditors of the late firm of Wm. Kenner & Co., alleges that in June, 1826, John R. Holliday, now deceased, acknowledged himself indebted to said firm in the sum of \$61,195 39, and to secure the payment thereof, he gave six promissory notes for the sum of \$10,199 06½, payable at different periods of four, five and six years; and further to secure the payment of said notes, he executed a mortgage to said syndic or his successors, on a sugar plantation, the slaves and stock thereon, in the parish of Jefferson. That sometime in the year 1827, the said Holliday died, and at a public adjudication and sale of the effects composing his succession, ordered by the Court of Probates of the parish aforesaid, his widow, the present defendant, became the purchaser of said plantation, its dependencies and slaves, subject to the debt and mortgage aforesaid, which she specially assumed and contracted to pay to plaintiffs. It is further alleged said notes are to bear interest from the time due until paid, at the rate of eight per cent. per annum; that they are now due, for which a judgment is prayed and a sale of the mortgaged property.

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The defendant denies being indebted in the manner and for the amount claimed. She admits her late husband signed the notes sued on, and avers that in the act of mortgage, she was made to renounce her just rights in favor of the plaintiffs, to her great injury and in violation of law.

She further avers the notes were given in part for an usurious consideration to the amount of \$30,000.

It is also averred that she has renounced the community of acquests and gains, and that she is a mortgage creditor of the succession for \$30,000, and is also the tutrix of her minor child, D. C. Holliday.

She further says, she is indebted to her daughters, Eliza and Maria Davis, for whom she is tutrix, a large sum, which in consequence of the conduct of plaintiffs she is unable to pay, that they have a legal mortgage on the property, which ought

EASTERN Dis. to be admitted in preference to plaintiffs. She further answers
July, 1841. that if the whole amount claimed by the plaintiff is allowed,
KENNER & CO'S the property of the succession will be insufficient to pay the
SYNDIC mortgage debts, that the Probate Court has never established
vs. their amounts or order of privileges, and until a classification
HOLLIDAY ET AL. takes place the plaintiff has no right of action.

The defendant further alleges that in ignorance of her rights she has signed a renunciation of them, which is null and void, and asks relief in her own right and as tutrix, and prays to have paid back the sum of \$13,000 paid plaintiffs by her.

By an amended answer the defendant avers the slaves mentioned in the petition, and mortgage, have, with a few exceptions, been taken from her by plaintiff and the Bank of Louisiana, and sold for their joint account.

Also that since the institution of this suit she has been disturbed in her possession by the suit which Gaines and wife have instituted against her in the Circuit Court of the United States, to recover the land, which amounts to a disturbance.

That in consideration of the purchase of said land and slaves she engaged to pay \$120,000 of the mortgage debts, but as those debts have never been classed she does not know who to pay, nor is she bound to pay any one until after the decision of the suit of Gaines and wife against her.

On the 23d of January, 1840, more than four years and six months after the commencement of this suit, Mrs. Taylor and Mrs. Kenner, the two daughters of Mrs. Holliday by her first husband, William Davis, presented their petition of intervention, alleging themselves to be the only heirs of their father. That their mother was their tutrix, and in 1823 contracted a marriage with John R. Holliday, without the consent or authorization of a family council. That shortly afterwards, their mother, duly authorized by her husband, applied to the Court of Probates of the parish of Feliciana to have adjudicated to her all the property left by their father, and partly held in common with your petitioners, which was granted and on the same day Mrs. Holliday and her husband gave a mortgage on sev-

enty-eight slaves, fifty-nine belonging to herself and seventeen to John R. Holliday, to secure the rights of petitioners in the estate of their father, amounting to the sum of \$29,614, which she bound herself to pay them, when they arrived at the age of majority, with five per cent. interest from the 5th of April, 1822.

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They say that as their mother married Holliday without the assent of a family council, they both became liable to them *in solido*, and all the property of each became mortgaged to secure them in their rights. They further say, Holliday took possession of all the property adjudicated to their mother and mortgaged to them, and afterwards mortgaged a portion of the slaves to the Bank of Louisiana and to the plaintiff to secure them in certain debts, and that a number of the slaves have been sold to pay the debt to the Bank. They allege their superior mortgages on the property of Holliday and claim to be paid by preference out the fund for which the plantation sold. They allege they have brought a suit against their mother as their tutrix and obtained a judgment against her for the balances coming to each, which they pray may be paid to them by preference over the claim of the Syndic of Kenner & Co. They also wish to send the cause to the Court of Probates to have the debts classified and the funds distributed according to law.

The intricacy of these pleadings and the confusion thereby created, has thrown difficulties in our way, which a statement of the facts will in some measure simplify.

John R. Holliday married Mrs. Davis in the year 1822, who then had two children, the intervenors. The proceedings in relation to taking possession of the property left by their father, but a small portion of which was community, are substantially set forth in their petition. The family council that recommended the adjudication was in part composed of women and some of the other acts seem not to have been very regular; Mr. and Mrs. Holliday took possession of all the property, and the

EASTERN DIS. slaves were removed to the plantation of the former on the Mississippi in the parish of Jefferson.
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On the 3d of November, 1825, Holliday being indebted to Kenner & Co., \$120,664 14, to secure the payment thereof, executed a mortgage on his sugar plantation and fifty-seven slaves. This debt was an actual balance owing of \$80,188 40 and \$40,475 74 of ultimate liabilities coming to maturity.

On the 13th of June, 1826, the syndic of Kenner & Co., (that firm having failed,) released the mortgage of the 3d of November, 1825, and then Holliday and wife executed a mortgage to the Bank of Louisiana for \$60,000, and another to the syndics of Kenner, (on which this suit is brought,) for \$61,194 30, payable in instalments of four, five and six years. The mortgage in favor of the bank to have a preference over the other. The funds raised by the mortgage to the bank were applied to the reduction of the mortgage in favor of Kenner & Co., which was released and a final settlement took place. Shortly after this arrangement, Holliday died, leaving one child by his last marriage and one by a previous marriage. His estate being considered insolvent, his son by the first marriage renounced his succession, his widow, (the defendant,) renounced the community, and qualified as the tutrix of her minor child, Daniel C. Holliday; but never accepted or renounced the community; it therefore stood as to him as accepted with the benefit of inventory. Samuel Livermore was appointed administrator of the succession, a meeting of creditors was held, at which only three creditors, that is the Bank of Louisiana, the syndics of Kenner & Co., and another were present. It was agreed to sell the plantation and slaves that were mortgaged in block; the terms were, the purchaser was to assume and become specially liable to pay the mortgages to the bank and to the syndics of Kenner & Co.; to pay \$4,500 in ninety days and the balance cash. Upon these terms Mrs. Holliday, the defendant became the purchaser; the plantation and slaves were adjudicated to her and in a notarial act made by Livermore as administrator and accepted by her, she specially contracts to pay

the debts to the bank and the plaintiffs. The remainder of the estate, amounting to upwards of \$10,000, was administered by Livermore, he called on the creditors to present their claims which was done; he made a tableau of distribution, which showed a dividend of sixty-three per cent., whether it was ever homologated or not does not appear, but we hear nothing more of his administration. At the meeting of creditors Mrs. Holliday did not appear to present any claim in her own behalf or that of her minor children by the first or second husband. She took possession of the property under the sale, made crops and from the proceeds of them and the sale of a number of slaves, some included in the mortgage and some not, she paid off the mortgage to the bank and paid about \$13,000 on that in favor of plaintiffs, the balance not being paid this suit was commenced in 1835. In the year following Mrs. Taylor and Mrs. Kenner, the heirs of Davis, commence their suit against their mother to recover their portion of the estate of their father. The petition and the answer are filed the same day, judgment was rendered by consent, execution issued and seizure made of the plantation on the same day, and a sale made by the sheriff in ten days after. The succession of Holliday was in no way represented in this proceeding, but the plaintiffs appear to have consented to the sale, which produced on a credit \$151,900, their respective rights to which, is the matter in litigation.

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If the plaintiffs and the intervenors were the only parties endeavoring to get a portion of this sum, our task would be light, as there is said to be enough to pay both, but an effort is made to obtain a share for Mrs. Holliday, the defendant, and her minor son, Daniel C. Holliday.

Mrs. Holliday by renouncing her interest in the community of her last husband, John R. Holliday, put herself in the position of a stranger to it, she was not responsible for any of its obligations further than she had specially bound herself for them, and could have asserted against it any claims she might have. She was capable of contracting with the administrator,

EASTERN DIS. and did so. She became the purchaser of the plantation and
July, 1841. slaves in which she had twice renounced her rights, first when
KENNER & CO'S she signed the mortgages, and again when she renounced the
SYNDIC community after the death of Mr. Holliday. The payment of
VS. the mortgages in favor of the Bank of Louisiana and the plain-
HOLLIDAY ET AL. tiffs, together with \$4,500 to the administrator in ninety days,
 and any sum over in cash. Upon these terms Mrs. Holliday
 became the purchaser and accepted the sale.

The administrator was the vendor, she the vendee, and the
 plaintiffs to be receivers of the price in consideration of their
 promise to release their mortgage in payment of their debt.
 Mrs. Holliday having specially assumed to pay this debt, and
 having received a valuable consideration for her engagement,
 cannot be permitted to oppose against the creditor a claim she
 may have against the estate of her husband. Suppose Mr.

A third pur-
 chaser of an es-
 tate subject to
 certain mort-
 gages, which
 she assumes to
 pay, cannot set
 up her claims
 in opposition to
 the mortgage
 creditor on said
 estate.

Holliday were now alive and the plaintiffs were pursuing him
 and her on the mortgage she could not interpose any claim she
 might have against her husband between him and them, be-
 cause in their favor she had renounced all claims against him
 that could be preferred to them. How then can she now oppose
 the payment of a claim which in addition to her previous ren-
 unciation in its favor, she has specially contracted to pay?

We recently held in the case of *Arnous vs. Davern et al.*,
 18 La. Rep., 42, that where A contracted with B, to pay a
 debt, which he owed C, and C sued A on his assumption, the
 latter could not oppose any equities that might exist between
 him and B to defeat a recovery by C. The present case is
 stronger than that.

As to demand for security on account of the alleged distur-
 bance by the suit of Gaines and wife against Mrs. Holliday,
 we can see no reason for it. The syndics of Kenner & Co. are
 not vendors, they do not sign the adjudication or join in the
 notarial act of sale with Livermore, the administrator, nor is
 there any contract of warranty on their part. In the meeting
 of creditors they stipulated for nothing more than what their
 mortgage accords to them; they give no extension of time nor

do they consent to any thing further, than that the property be sold subject to their mortgage. The right to call on a party to give security rests upon the principle that there is an obligation of warranty, and we have yet to learn that the creditor of a deceased person, is bound to warrant the title of all the property sold at the sale of his succession, because the proceeds are applied to the payment of his debt. If the syndics of Kenner & Co. had have proceeded judicially on their mortgage and had the property sold under it, a contingency might arise, by which they might, perhaps be bound to warrant the title, but as they have not so proceeded, the contingency cannot arise and they are not bound. We are not disposed to give an extended construction to the article 2535 of the La. Code, as the operation of it may, and we believe will be, a source of constant litigation, without going beyond its obvious meaning. There is a clear distinction between this case and that of Dennis *vs.* Clague's syndics; 7 Martin N. S., 93. There the syndics were the agents of the creditors and the vendors, but we cannot see how Livermore acting as the administrator of Holliday is to be made the agent of the creditors. He was the officer or agent authorized by law to settle the estate, pay the debts and give whatever balance might remain to the heirs. We do not think the syndic of the creditors of Kenner & Co. is bound to give any security to indemnify the defendant against the claim of Gaines and wife.

In relation to the interest, it is only necessary to remark, that as the defendant is not entitled to security for the title, there is no cause for delaying the payment, and if there had been cause, the interest must still be paid in conformity with the principles laid down in the case of Ball's Heirs *vs.* Le Breton *et al*, decided a few days past, (ante p. 147.)

Upon a full examination of the plea of usury and the evidence in relation to it, we are of opinion it cannot avail the defendant. She contracted to pay the debt which Holliday owed plaintiff and received property to enable her to do so, she cannot enter into consideration of that debt, and by defeating it,

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The creditors of an estate are not bound to give security to the purchaser before coming on him for their claims due by it, on the ground that he is in danger of eviction. The right to call on a party to give security implies a warranty against evidence.

A person contracting to pay the debt of another and receiving property out of which it was

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to be paid, cannot oppose the plea of usury or go into the consideration of that debt, and retain the means placed in his hands to pay it.

release herself and also keep the means put into her hands to pay it. But it is alleged it is the minor heir of John R. Holliday that contests it, and he has an interest in doing so, as if any balance of the estate is left after paying the debts, he is entitled to it. It is true he is interested, but a question may well arise, whether the tutrix can interpose a claim or debt owing to the minor, to protect herself from the payment of a personal obligation. She certainly cannot do it in compensation, or as a confusion, as the capacity in which she is bound, is altogether different from that in which she claims. But this question it is not material to discuss, as we are of opinion the parties are precluded from going into an examination of the alleged usurious consideration.

By reference to the original mortgage of November 3d, 1825, it will be seen that it was for \$80,188 40, balance due Kenner & Co., and for \$40,475 74 for acceptances and other liabilities coming to maturity. In June, 1826, the loan of \$60,000 was obtained and appropriated, first, to the payment of the liabilities and acceptances, and secondly in discharge of the debt due Kenner & Co., by which it was reduced from \$80,188 40, to the sum of \$61,194 39 for which the last mortgage to the syndic was given. The whole sum alleged to be usurious is less than \$16,000, and the usurious interest all accrued previous to the execution of the first mortgage in November, 1825, and as about \$20,000 were paid in the June following, the whole amount complained of as usurious, has been paid, and cannot be recovered back again. 2. La. Rep., 431; 4 La. Rep., 544; 8 La. Rep., 267.

Usurious interest which has been paid cannot be recovered back.

The remaining questions relate to the intervention of Mrs. Taylor and Mrs. Kenner; and the first is as to their prayer, that this cause be referred to the Probate Court, and the whole estate of John R. Holliday again examined into and settled, and their claims allowed. What might have been, or what may be the result of a proceeding to effect that object, if commenced by these intervenors against all the creditors and heirs of John R. Holliday, it is not necessary now to inquire; but it

is clear, the intervenors have no right to come in and contest the jurisdiction of the court, in which the plaintiff certainly had a right to sue the defendants. It was not indispensably necessary to the assertion or protection of their interests, that they should interfere in this suit; but as they have chosen to do so, they must take the cause as they find it, and if their interests are affected in consequence, it is the result of their own acts. The Code of Practice, articles 392, 393, 397, settle this question.

The intervenors say, they have a tacit mortgage on all the real estate of John R. Holliday, deceased, to secure the amount coming from the estate of their deceased father, William Davis; he having married their mother without the consent of a family council, whereby he became responsible *in solido* with her. This is no doubt true; Old Civil Code, p. 60, art. 10; La. Code, art. 272; and they have a right to follow the property in the hands of whosoever may have it in possession. They had a mortgage on the land and slaves which John R. Holliday owned at the time he executed the mortgage to plaintiff, and also on all the property owned by their mother, the defendant. She is as much bound, as Mr. Holliday was, and as she purchased all the property of her late husband, subject to this mortgage, it is responsible in her hands to the payment of the intervenor's debt. She is also liable to pay the debt due to plaintiff, so that as to her it is a matter of but little concern, who comes first upon the fund in controversy, as she has to make up the deficiency, if there should not be enough to satisfy both debts.

The counsel for Mrs. Holliday complains very much, because, as he says, the property which she had at the time of her second marriage, has been sold to pay her late husband's debts. This is not so. Mrs. Holliday sold the negroes herself, to pay for the property she now enjoys, which was bound for those debts, and she has no reason to complain, that the creditor wishes to be paid—now that she has realized a handsome competency by the operation.

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HOLLIDAY ET AL.

Intervenors have no right to come in and contest the jurisdiction of the court in which the plaintiff had a right to sue. They must take the case as they find it, and if their interests are affected, it is the result of their own acts.

EASTERN DIS. But let us now see, how the case of the intervenors stands.
July, 1841. They have no demand liquidated against the succession of
KENNER & CO'S John R. Holliday for any sum, nor have they any judgment
SYNDIC against him. The judgment obtained against Mrs. Holliday
VS. as to third persons, has no binding effect, and we under-
HOLLIDAY ET AL. stand the plaintiffs as contesting it, both as to the sum al-
lowed, and its regularity and binding operation. It is a
judgment rendered by consent, disregarding all the legal
delays and formalities, and however binding between the
parties, has no effect against third persons. There is no
doubt, the intervenors had a mortgage on the land sold un-
der the execution issued on their judgment; and as they
agree, their lien shall operate on the proceeds, we must
give it effect; but as the amount for which they have a
preference, is not fixed, we must remand the cause, to have
it ascertained.

The judgment of the Commercial Court is therefore af-
firmed so far as it concerns the plaintiff and the defendant,
Maria Holliday: but so far as it concerns the intervenors,
Maria Taylor and Eliza Kenner, and the dismissal of their
petition, it is ordered and decreed, that said judgment be
reversed and said petition reinstated, and the cause remanded
to the Commercial Court, for the purpose of ascertaining
the amount due to each of the intervenors from the estate
of William Davis, their deceased father, which amount when
ascertained and liquidated, is to be paid out of the sum of
\$151,900, in preference to the syndics of the creditors of
William Kenner & Co.: all the costs of this appeal, except
those of the intervenors, to be paid by the defendant, and
those of the intervenors to be paid by the plaintiff.

STATE OF LOUISIANA *vs.* JUDGE OF THE
FIRST DISTRICT.EASTERN DIST.
July, 1841.ON AN APPLICATION FOR A WRIT OF PROHIBITION, IN THE MATTER OF THE
CITY BANK OF NEW ORLEANS *vs.* D. T. WALDEN.STATE OF LA.,
vs.
JUDGE OF THE
FIRST DISTRICT.

The plaintiff, in Injunction, who is non-suited, is entitled to a *suspensive* appeal, on giving his bond for the amount of the costs and one half over.

191	167
46	495

In an Injunction case to restrain the adverse party from taking out an order of seizure and sale, when the plaintiff is non-suited and takes a *suspensive* appeal, a writ of prohibition will be granted to the Judge *a quo*, prohibiting him from proceeding to allow the order of seizure, until the party is heard on his appeal.

191	167
51	467
51	468

Such as the Injunction originally was before the judgment of non-suit, so it remains afterwards, until the appeal is tried; and no proceedings can be had until it is finally decided in the Supreme Court.

19	167
120	634
1120	637
120	639

A prohibition is not a writ of right, but the court may grant it on such conditions as will secure to the party who may suffer by it, sufficient indemnity for the trouble, delay and losses he may unjustly sustain.

This case comes up on a rule taken by D. T. Walden, on the District Judge of the first judicial district, to show cause why a writ of prohibition should not issue, commanding him to abstain from all further proceedings in the case of the City Bank of New Orleans, against D. T. Walden.

The petitioner, Walden, alleges that on the 26th of October, 1840, he commenced suit against the said City Bank to annul certain mortgages given by him to the Bank, on the ground that they were null and void: and that he prayed for and obtained an injunction against the Bank, to prevent it from taking out an order of seizure and sale, until the suit for the annulment of said mortgages could be tried and finally decided. That, on the 10th November following, the Bank took a rule on him to show cause why the injunction should not be dissolved and set aside; which rule, on hearing the parties, was made absolute, and judgment rendered setting the injunction aside; from which, this petitioner took a *suspensive* appeal on giving bond with a surety in the sum of \$6000. That on the 8th December, 1840, the City Bank applied for an order of seizure and sale, which was refused by the District

EASTERN DIST. Judge; and from this refusal the Bank appealed, which is still
July, 1841. pending.

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The petitioner further shows, that after this appeal was taken by the City Bank, his injunction suit came on for trial and a judgment of non-suit was rendered against him, from which he took an appeal within the time required by law to stay execution, and gave bond and security for the amount of the judgment *and one half over*, in pursuance of the order of court. This bond was for only \$250, the amount necessary to cover costs. That afterwards, to wit: on the 25th January, 1841, the District Judge granted an order of seizure and sale, by endorsing the same on the petition, on which he had previously refused said order. It is against this order of seizure and sale, the petitioner prays a writ of prohibition to the District Judge to abstain from all proceedings in the matter until the further order of this court.

The District Judge showed cause and set up various matters against the application. Among others he considered the judgment of non-suit as disposing of the injunction, and that the writ of seizure could properly issue; especially as he considered the appeal taken therefrom as *not* suspensive; the appeal bond being only for \$250, and merely to cover costs, when the amount of the debt or matter in dispute exceeded \$200,000.

2. The petitioner has shown no legal grounds for a writ of prohibition in this case. His remedy, if he is injured or aggrieved by the order of this court granting the writ of seizure and sale, is by an appeal from it. It would be assuming original jurisdiction in the Supreme Court, to take cognizance of the case and award a writ of prohibition, when the remedy of the party is by appeal; and when they can extend the relief sought, in the exercise of their appellate jurisdiction, and to which, it is respectfully urged, they are restricted by the constitution.

Hoffman & Grymes, for the applicant.

The District Judge also appeared in *propria persona*, and BARTON Dec.
July, 1841. argued against the prohibition.

Simon, J. delivered the opinion of the court.

STATE OF LA.,
CO.
JUDGE OF THE
FIRST DISTRICT.

This is an application for a writ of prohibition. The applicant, D. T. Walden, alleges that on the 26th of October, 1840, he instituted a suit against the City Bank, praying that two mortgages executed by public act, amounting together to \$200,000, be declared null and void; that in the mean time he obtained an order enjoining the said bank from suing out any order of seizure and sale on the said mortgages, and gave the bond and security required by the court. That on the tenth of November ensuing, a rule was taken to dissolve the injunction, which was set aside by the court with damages, from which judgment he took a suspensive appeal. He further states that on the 8th of December, the City Bank filed their petition praying for an order of seizure and sale on the said mortgages, which was refused by the lower judge, from whose judgment an appeal was also taken and is yet pending before this court. That subsequently the injunction was tried on its merits, and a judgment of non-suit was therein rendered, from which the applicant took his appeal within the time required by law for staying execution, and gave bond and security in pursuance of the order of said court; and that on the 26th of May, 1841, the district judge granted *ex parte* an order of seizure and sale of the property mortgaged by endorsing the same on the petition filed on the 8th of December, 1840, and now pending on appeal, and is about to carry the same into effect, unless arrested by a prohibition from this court.

The applicant's petition having been served on the district judge and on the City Bank, said judge answered the rule by first representing that there was no proceeding now pending before his court against which, in his opinion, a writ of prohibition could properly issue; and after giving a statement of the several proceedings had before him, which are the same alluded to in Walden's petition, he goes on to state: "the cause of

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Walden vs. the City Bank has since been heard upon the merits, and the court being of opinion that the plaintiff had failed to establish any right to the interposition of the court in his behalf, gave judgment of non-suit. If no appeal had been taken from this judgment, it is apparent that the appeal from the judgment upon the rule to dissolve, would have become at once nugatory. The injunction granted was a mere accessory to the principal demand, the principal demand being dismissed, it is obvious that its accessories, in whatever court pending, must share its fate."

"But an appeal was taken and bond given for two hundred and fifty dollars, the application of the bank for an order of seizure and sale upon its mortgages, purporting a confession of judgment, was then renewed. The question then presented to the decision of the court was whether an appeal from a judgment of non-suit with a bond of \$250 could stay the execution awarded by law upon mortgages, to an amount exceeding two hundred thousand dollars. In the opinion of the undersigned, such an effect could not legally follow such an appeal, and the order of seizure and sale was therefore granted."

During the interval between the judgment on the rule to dissolve the injunction and the judgment on the merits of the suit of **D. T. Walden vs. the City Bank**, an order of seizure and sale was refused to the bank; but, in the view of the undersigned, the circumstances were materially changed after judgment on the merits and it then became proper to award to the bank, the order which had formerly been refused."

He also refers to the records filed in this court in the several suits between the parties therein interested, and further alleges that when Walden's petition of appeal was presented, his counsel disclaimed any intention of demanding a stay of execution, and that the appeal was consequently allowed with the security tendered.

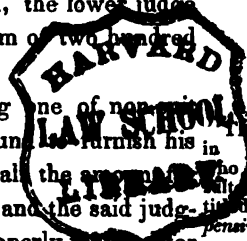
The city bank also appeared, and referred us to the answer of the district judge as containing sufficient reasons why the writ of prohibition should not be granted.

We have examined the records referred to in the district judge's answer, and have been able to ascertain that the facts therein stated and those alleged in the applicant's petition are correct. It appears further that when Walden obtained his injunction, he gave a bond and security according to the order of the court in the sum of twenty thousand dollars; that on the dissolution of the injunction, he and his sureties were condemned to pay *in solido* ten per cent. per annum on the amount of the injunction bond; that on appealing from said judgment, he gave an appeal bond and security in the sum of six thousand dollars; that when the order of seizure and sale first applied for after the dissolution of the injunction, was refused, the district judge was of opinion that "the bank could not proceed against Walden by the *via executiva*, so long as the appeal was pending, for that appeal necessarily revived the injunction;" and that when the petition of appeal from the judgment of non-suit was presented to him, the lower judge only required a bond and security in the sum of two hundred and fifty dollars.

The judgment last appealed from, being one of non-suit only, it is clear that the appellant being bound to furnish his bond and security for a sum exceeding one-half the amount of the judgment which the judgment was given against him, and the said judgment being merely for costs, the bond was properly required for the sum of two hundred and fifty dollars; *Code of Practice*, art. 575. This was sufficient to make the appeal suspensive, without reference to what had been previously done in the case.

But it is contended that in order to prevent the bank's obtaining an order of seizure and sale, by virtue of the mortgage; that is to say: to give effect to and to revive the writ of injunction during the pendency of the cause before this court, the appellant ought to have furnished his appeal bond and security for three hundred thousand dollars, as the security on the injunction bond was only given to secure damages and not the debt. We cannot agree to this proposition: we conceive

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that, by obtaining his writ of injunction and furnishing the security required by the judge, Walden became entitled to the protection of the court, and to its interposition so as to prevent the seizure and sale of the property mortgaged as long as the matter in controversy remained undetermined. On the dissolution of the injunction with damages in the court below, he took a regular suspensive appeal, which necessarily had the effect of maintaining the injunction and of leaving the case and all the orders taken in it, in the same state in which they were previous to its being dissolved. The district judge himself was convinced of the correctness of this course, when he refused to grant the order of seizure and sale first applied for, and we are unable to see any good reason why after the trial of the injunction suit on its merits, and after a suspensive appeal had been granted from his judgment of non-suit, he should have thought himself authorized to destroy the effect of his first decision, and to deprive the applicant of the legal protection which had been extended to him by the issuing of the writ of injunction. If the order made by the district court granting an appeal from the judgment dissolving the injunction, deprived that court of further jurisdiction in the cause, and transferred it to the appellate court, it is clear that it was not in the power of the inferior judge to take cognizance of any proceeding which would have for its object the violation of an anterior order, which, by the appeal was revived or continued in full force; and the more so that a similar application having already been made to him, after the injunction was dissolved, he had thought proper to refuse it as illegal or irregular, and that an appeal from this judgment had also been taken and was then and is now yet pending before the appellate court.

It may be true that the appeal in question will perhaps occasion an improper delay to the bank, and will effectually suspend the ultimate recovery of the amount alleged to be due by the applicant, without any other security, as to the debt, than the property mortgaged which, having never been seized, remains in his possession; but it is equally true that no judg-

In an Injunction case to restrain the adverse party from taking out an order of seizure and sale, when the plaintiff is non-suited and takes a suspensive appeal, a writ of prohibition will be granted to the Judge *à quo*, prohibiting him from proceeding to allow the order of seizure, until the party is heard on his appeal.

ment was ever rendered against him for the said amount ; that on the contrary the first demand made by the bank for an order of seizure and sale has been rejected ; and we know of no law that requires a plaintiff in injunction, who has given his bond to secure the damages which may be sustained by the defendant, and who, on appealing, gives another bond to secure the damages recovered against him, to furnish an additional appeal bond for the purpose of securing the amount of the debt. Such as the writ of injunction was originally granted and issued ; such, after the appeal, must it continue to remain in its full force and effect, until the final determination of the suit in the appellate court. It is a well settled rule that " after a cause is sent to the Supreme Court by regular appeal from any of the inferior tribunals of the State, the court of the first instance can no longer legally take any steps in a case they transferred, except such as may be necessary to transmit the record to the court above, in the manner provided by law." *Pemberton vs. Zacharie*. 4 La. Rep., 205. See also, 6 Martin, N. S., 464; 7 Idem, 353; 8 Idem, 440; 5 La. Rep., 314, and 15 Idem, 391.

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Such as the Injunction originally was before the judgment of non-suit, so it remains afterwards until the appeal is tried; and no proceedings can be had until it is finally decided in the Supreme Court.

We therefore consider that this is a proper case to require the application of the provisions contained in the articles 846 and following of the Code of Practice: but as the writ applied for is not a writ of right ; and as we conceive it is in our power to grant it with such conditions as will secure to the party who may suffer by it, a sufficient indemnity for the losses, trouble and delay, which it may perhaps unjustly and improperly occasion him to sustain. We think it our duty under the circumstances of the case, to require that, before the issuing of the writ of prohibition by him prayed for, the applicant shall file with the clerk of this court, his additional bond in favor of the City Bank, with good and sufficient security *in solido*, for the sum of *seventy-five thousand dollars*, conditioned that he shall pay all such damages as shall have been sustained by the said bank, in case it should be decided that the injunction heretofore obtained has been wrongfully sued out, and illegally and improperly kept in force on the appeal before this court.

A prohibition is not a writ of right, but the court may grant it on such conditions as will secure to the party who may suffer by it sufficient indemnity for the trouble, delay and losses he may unjustly sustain.

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It is therefore ordered, adjudged and decreed that a writ of prohibition issue, on the applicant's complying with the condition above expressed before the expiration of this month, by filing his bond with good and sufficient security for the sum of seventy-five thousand dollars, conditioned as above specified.

191 174
49 1720
49 1780

19 174
113 1077

**STATE OF LOUISIANA vs. JUDGE OF THE FIRST
DISTRICT.**

AN APPLICATION FOR A WRIT OF PROHIBITION, IN THE MATTER OF
LARTIGUE vs. FEET & NORTH.

An oath is not required to a petition for a writ of prohibition, if the truth of the facts stated in it appear from an inspection of the record and proceedings had in the case.

Where, by an error of the Judge *a quo*, in refusing to give to the appeal the effect of a suspensive one, by authorising an execution to issue, after being divested of jurisdiction, a writ of prohibition is the proper remedy to correct such error.

The signature of the parties to a blank appeal bond is binding on them, and may be filled up afterwards, to operate as a suspensive appeal.

When a suspensive appeal is once granted and bond signed accordingly, the jurisdiction of the judge *a quo* is at end, after ascertaining the security is good.

A writ of prohibition may issue to suspend the action of an inferior tribunal for a time, and until it legally resume the exercise of its former jurisdiction.

The judge of an inferior court cannot grant an order of seizure and sale, after an appeal is taken from his *refusal* to issue the same order, previously applied for. But if *he does*, the proper remedy to arrest his proceedings, is by a writ of prohibition.

The authority to grant writs of prohibition, is considered, in relation to the constitution, which allows to this court appellate jurisdiction only, and is to be confined to matters, which have a tendency to *aid that jurisdiction*.

This case arises on an application for a writ of prohibition to the Judge of the first judicial district requiring the plaintiff in execu-

tion, Lartigue and the sheriff executing it, to abstain from and stop all proceedings under the judgment and execution, until the defendants therein, Peet & North, can be heard on appeal.

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The facts show, that Lartigue obtained a judgment against Peet & North, in the district court, for \$607 50, upon which the latter prayed a suspensive appeal, and filed their bond with a surety in the sum of \$1000. The bond was signed, and the sum inserted, but the blanks left in the printed form were not filled up with the names of the appellee, and the date, &c. The appeal was granted the 28th April, 1841, and on the 11th May a rule was taken on the appellants to show cause, why the appeal should not be dismissed. 1. That there was no bond executed by the defendants in favor of the plaintiff, according to law. 2. That the security tendered by the defendants in the instrument purporting to be an appeal bond, is insufficient. On hearing the rule, testimony was taken to show the surety was solvent and liable for the sum in the appeal bond. But the judge *a quo* ordered, that the "rule be discharged, without *prejudicing the rights of the plaintiff to take out execution.*" Upon this order the execution in question issued, and the sheriff was proceeding to seize and sell the property of the defendants therein.

Grymes, for the defendants in said execution, applied for a prohibition on the district judge; the plaintiff and sheriff to stay further proceedings, until they could be heard on their appeal. The application was made to this court by simple petition, and not sworn to.

The District Judge showed cause, why the prohibition should not issue, and appeared in support of his position and grounds. They are stated in the opinion of this court.

Simon, J. delivered the opinion of the court on this application.

This case is brought before us on a rule obtained by the defendants, requiring the judge of the district court, the sheriff

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and the plaintiff, to show cause, why a writ of prohibition should not issue. The applicants represent, that on the 19th of April, 1841, a final judgment was rendered against them in the district court of the first judicial district in favor of the plaintiff; that on the 28th of the same month they presented their petition of appeal, and gave bond and security according to law, to operate a stay of execution, and that notwithstanding said appeal so taken, plaintiff has been permitted by the district court to take out execution against them, on the judgment appealed from, which execution is now in the hands of the sheriff of said court.

It appears from the record, that on the 28th of April, 1841, a printed appeal bond, containing several blanks, was filed by the appellants, after having been signed by them and their security; that when said bond was filed, the sum of \$1000 was filled up in the blank as the amount thereof, and that all the other blanks in the bond, including the name of the appellee, were not filled up until the 28th of May following, when they were so filled up by the clerk of the district court, with whom the bond had been left by the appellants, at which time the transcript of the record for the supreme court was completed, including the appeal bond. In the mean time, the appellee obtained from the court below a rule on the appellants, to show cause, why the appeal should not be dismissed on the grounds, that no appeal bond had been executed according to law, and that the security tendered in the instrument, purporting to be an appeal bond, was insufficient. This rule was discharged by the district judge, *without prejudicing the rights of the plaintiff to issue execution.*

The lower judge has shown for cause: 1. That the petition filed herein is not sworn to according to law. Code of Pract., art. 848, and French text.

2. That if there is any ground for prohibition, under the allegations of the petition, said writ should not issue against the undersigned, but against the party prosecuting the execution, and the sheriff of the district court. C. Pr. 850, 858.

3. That the petition shows no legal ground for the writ of prohibition. EASTERN Dis.
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4. That the petitioner has mistaken his remedy, which was by injunction or appeal. STATE OF LA.,
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The appellee and the sheriff have not answered, but their counsel having agreed to adopt the answers of the judge as their own, we shall proceed to examine the above grounds relied on by them, in the order in which they have been set up; after having bestowed on the questions therein presented, all the attention which their importance requires.

I. The *article* 848 of the Code of Practice provides, that "the court, to which this petition (for a writ of prohibition) is offered, shall require the oath of the petitioner to the truth of the facts stated in it, unless these facts be proved by the mere examination of the prayer or of the proceedings which took place before the inferior court." In French it says: "*La cour devra exiger le serment du pétitionnaire, et à moins que ces faits ne soient prouvés par l'inspection seule, &c.*" It does not appear to us, that it was necessary in this case to require the oath of the petitioner, as the facts, on which the application is made, are sufficiently proved by an inspection of the record of the proceedings had before the inferior court. We understand the law to mean, that we should require the allegations contained in the petition to be sworn to, only in case of our not being satisfied of their existence, after an examination of the prayer or of the proceedings, and that such an oath is not to be taken, unless we require it. *C. of Pr.* 849. An oath is not required to a petition for a writ of prohibition, if the truth of the facts stated in it appear from an inspection of the record and proceedings had in the case.

II. It is true, that the inferior judge has nothing to do with the issuing of the execution of a judgment; this proceeding generally takes place at the request of the party who instructs the clerk accordingly, and when put in the hands of the sheriff, it is carried into effect without the interference or interposition of the judge; but in this case, the execution was issued in consequence of a special order of the court, that the appeal should not operate as a suspensive one, the rule being discharged, *without prejudicing the rights of the plaintiff to*

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issue his execution. Then the question presents itself: was the appeal suspensive or merely devolutive? If suspensive, we have often and very lately decided again, that the lower court has no longer any jurisdiction in the cause, until the case having been disposed of by the appellate court, its mandate is returned below for execution; and consequently, the inferior judge had no power to order an execution to issue. 4 *La. Rep.*, p. 205; 15 *Idem*, 391; and the case of *D. T. Walden vs. City Bank*, *ante*, 167,. If devolutive, the appellee was at liberty to take out his execution, without any necessity of applying to the district judge for that purpose. In such a case however, we understand from the *art. 853 of the Code of Practice*, that if, on an application made to this court for a writ of prohibition, it were to be shown, that the execution issued illegally and unadvisedly in a cause, where the inferior court had no jurisdiction, that is to say: because it had been deprived of further jurisdiction by a suspensive appeal, a writ of prohibition could then properly issue, directed as well to the party proceeding as to the officer charged with the execution, without any reference to the judge who rendered the judgment. But, in the present case, the execution was issued by the party after having obtained the action or opinion of the district judge on the legality of this proceeding, after the appeal had been granted, and the bond and security furnished, and it seems to us, that if it be established, that the appeal taken by the applicants ought to operate as a suspensive one, our mandate should as well be directed to the district judge, who would be thus found to have exceeded the bounds of his jurisdiction as to the plaintiff and the officer.

Where, by an error of the judge *a quo*, in refusing to give to the appeal the effect of a suspensive one, by authorising an execution to issue, after being divested of jurisdiction, a writ of prohibition is the proper remedy to correct such error.

We are not ready to deny to the district court the power of trying, on motion, the sufficiency of the security furnished on the appeal bond; indeed, this was not controverted and was even indirectly recognized as the proper course to be pursued, in the case reported 13 *La. Rep.* 574; but we think, that if an error be committed by the court below, by refusing to give to the appeal the effect of a suspensive one, and by authorizing

an execution to issue after becoming divested of jurisdiction, the proper remedy to correct such error, ought to be by a writ of prohibition under the provisions of our laws.

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III. The petition and the record show, that the appellants had caused their security to sign a printed appeal bond, one of the blanks of which was filled up at the time with the amount fixed by the judge, and that said bond was filed with the clerk within the ten days allowed by law. In our opinion, this bond was sufficient to bind the security. In the case of *Breedlove vs. Johnston*, 2 *Martin*, N. S., 517, this court held in substance, that the obligor who gives his signature in blank, is bound by the obligation which may be written above it; in the present case, as in the one just quoted, it is clear that the security left his signature with the proper officer, for the purpose of filling up over it, the blanks of an instrument, which was to be used as an appeal bond; he intended to be bound in the sum of one thousand dollars, and we cannot see any good reason, why he should not be held responsible in the manner, in which he consented to bind himself. This bond then was sufficient to make the appeal suspensive; and if so, the jurisdiction of the district court being suspended, the judge, after finding that the security was good and solvent, could not legally take any further step in the cause, by ordering an execution to issue; the plaintiff was precluded from taking it out, and the sheriff from carrying it into effect. We think therefore, that the grounds set forth in the applicants' petition are sufficiently legal for obtaining a writ of prohibition.

The signature of the parties to a blank appeal bond is binding on them, and may be filled up afterwards, to operate as a suspensive appeal.

When a suspensive appeal is once granted, and bond signed accordingly, the jurisdiction of the judge *a quo* is at end, after ascertaining the security is good.

IV. It has been strenuously urged that the appellants have mistaken their remedy which was by injunction or by appeal; and we must confess that our opinion was, in a great extent, shaken by the plausibility of the able and ingenious arguments of the district judge who appeared before us *in propria persona*; but on a closer examination of the subject, we have not been able to come to a different conclusion. This court has repeatedly disclaimed a *general superintending* control over the inferior jurisdictions, and when called upon to exercise

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any of those powers incident to our appellate jurisdiction, in cases which do not come before us directly by appeal, we have always required a strong case to be shown, and have generally felt the greatest reluctance in ordering the issuing of those writs which have mainly and particularly for their object the restraining or limiting of the inferior courts in the exercise of their legal and constitutional jurisdiction. Such are the views of this court as expressed in the case of the *State vs. Judge Bermudez*, reported in 14 *La. Rep.*, 481; but, after mature deliberation, it has appeared to us that the circumstances of the present case are so clearly within the meaning of the articles 845 to 854 of the *Code of Practice*, that the remedy therein allowed seems to have been provided for, for the very purpose, among others, of preventing the injury complained of by the applicants. Indeed, the matter in controversy before us presents no other issue between the parties, but a mere question of legal requisites: Was the law allowing a party a suspensive appeal complied with or not? The solution of this question is a matter connected with our appellate jurisdiction, and has a tendency to aid it or to make it effectual; if so we must conceive ourselves authorized and even bound to interfere with the proceedings of the lower court, and to afford the party complaining that protection which will secure to him the free exercise and ulterior benefit of his right of appeal; this object would not be attained by an injunction or by a second appeal, as it would be imposing on the appellants, who would be bound to furnish further security, in both cases, such additional conditions as have never been in the contemplation of our laws. If the applicants, from a strict compliance with the requisites of the law, are entitled to a suspensive appeal, they must enjoy the right of bringing it before us without being subjected to the risk of sustaining an irreparable injury or to the inconvenience and difficulty of instituting a new suit and of procuring additional security.

It has also been insisted that the object and effect of the writ of prohibition is to preclude the lower court forever from acting

or entertaining jurisdiction in a cause: It may be so in some cases, but under our laws, we think that a writ of prohibition may also properly issue to suspend the action of an inferior tribunal during a certain length of time, and until it can legally resume the exercise of its former jurisdiction. Prohibition is defined to be "the name of a writ issued by a superior court directed to the judge and parties of a suit in an inferior court, commanding them to cease from the prosecution of the same, upon a suggestion that the cause originally, or *from some collateral matter arising therein*, does not belong to that jurisdiction, but to the cognizance of some other court." *Bouvier's Law Dictionary, verbo, prohibition; 3 Blackstone, 112.* In the case of an appeal, it is clear that the jurisdiction of the lower court is provisionally suspended, and that the judge cannot take cognizance of any proceeding in the cause, until the return of the mandate of this court; and if, during the pendency of the appeal it becomes necessary, from some collateral matter arising in the cause in the inferior tribunal, to issue a writ of prohibition, such writ, which, although called prohibition, is really in the nature of the common law, writ of *supersedeas*, will cease to have its effect after the cause is either sent back for a new trial or remanded for execution of the judgment.

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A writ of prohibition may issue to suspend the action of an inferior tribunal for a time, and until it legally resume the exercise of its former jurisdiction.

We are therefore of opinion that the application of the appellants ought to be sustained, and that a writ of prohibition should issue directed to the judge *a quo*, to the appellee and to the sheriff.

Our learned brother of the District Court has endeavored, in his arguments, to controvert the opinion of this court lately delivered in the case of *D. T. Walden vs. the City Bank*, 17 *La. Rep.* 511. He has attempted to convince us that the remedy in that case was by appeal only, and not by a writ of prohibition;—that our decision was inconsistent with our first decree in the same cause: *ante* 167—and that we had assumed original jurisdiction in a manner contrary to the constitution of the State.

We have already expressed our views with regard to the

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remedy by appeal; we have shown the inconvenience and difficulty with which it would be attended, and in the case alluded to, this remedy would have proved not only insufficient, but entirely unavoidable. Indeed, what would have been the course pursued on an appeal from the order of seizure and sale in question? Forsooth, that the case would have been brought before us without any other issue and evidence but the petition and the documents thereto annexed; nothing else could have been shown before this court but the errors, if any, apparent on the face of the record, and the appellant, unable to put before us the real condition of his case, would thus be deprived of the relief which the law allows him to prevent the inferior judge from exceeding the bounds of his jurisdiction, and for the preservation of his legal rights under the previous appeals; for this purpose, it was necessary for him to show that a former appeal was pending from a judgment refusing the same order of seizure and sale; that an appeal was also pending from a judgment dissolving a writ of injunction originally granted to prevent the issuing of the order, and that the lower court had transcended its authority and jurisdiction by disregarding the three appeals, and ordering a writ of seizure and sale to issue, whilst all proceedings were suspended by the injunction. Without the evidence of these facts, the remedy resorted to by an appeal from the order of seizure and sale, would have been wholly ineffectual and nugatory. We are still of opinion that

The judge of an inferior court cannot grant an order of seizure and sale, after an appeal is taken from his refusal to issue the same order, previously applied for. But if he does, the proper remedy to arrest his proceedings, is by a writ of prohibition.

the District judge could not grant an order of seizure and sale after an appeal had been taken from his refusal to issue the same order previously applied for; that he had no right to rescind a former judgment in a case which was pending before the appellate court, and that the proper remedy to arrest his proceedings was by a writ of prohibition.

It has been also contended that our first decree in the case of *Walden vs. the City Bank*, is inconsistent with the second: the former was rendered under very different circumstances; the application there was made for the purpose of preventing the District judge from trying a cause on its merits, whilst an

appeal was pending from an interlocutory judgment dissolving a writ of injunction. We said that the judgment upon the rule, dissolving the injunction, far from being upon the merits was upon a matter purely incidental, that the appeal therefrom did not divest the court *a quâ* of jurisdiction, since there was no final judgment, and that it was clear that as a final judgment remained yet to be pronounced after a trial on the merits quite independently of any decision which might be rendered on the previous appeal, no writ of prohibition could issue to arrest the proceedings complained of. We are unable to perceive any inconsistency between the two decisions, which, on being confronted, will clearly appear to be predicated on very distinct and different questions.

But it has been maintained that by granting the writ of prohibition *sub modo*, and by requiring the applicant to furnish a bond with security for seventy-five thousand dollars, for the purposes set forth in our decision, our decree was a violation of the constitution of the State. The writ of prohibition, the power to grant which, is specially allowed by the code of practice to appellate courts of competent jurisdiction, is not a writ of right; it is within the sound discretion of the tribunal to which the application is made, and the party who resorts to it, is bound to establish such facts as to convince the appellate court that the remedy applied for is necessary, not only for the protection of the legal rights of the party, but also and principally for the constitutional exercise of our appellate jurisdiction. We understand therefore that the authority thus granted, being considered in relation to the constitution which allows to this court appellate jurisdiction only, is to be confined to matters which have a tendency to aid that jurisdiction, and that the issuing of the writ of prohibition, under the circumstances shown, may be constitutionally ordered upon such conditions as, in our legal discretion, we may think proper to impose on the applicant for the protection and benefit of his adversary, the exercise of whose rights, during the appeal, is to be suspended by such writ. In the case in question, the relief sought for, among

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The authority to grant writs of prohibition, is considered, in relation to the constitution, which allows to this court appellate jurisdiction only, and is to be confined to matters, which have a tendency to aid that jurisdiction.

EASTERN DIS. other objects, was to give effect to a writ of injunction which,
July, 1841. having been granted by the lower court, had been subsequently

STATE OF LA., dissolved, and was pending before us on a suspensive appeal.
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JUDGE OF THE We said that the injunction was revived and continued in force
FIRST DISTRICT. by the appeal, that it was not in the power of the inferior judge to destroy its effect, as long as the matter in controversy remained undetermined in this court; and that therefore his proceedings should be arrested. But in exercising this discretionary authority, for the purpose of aiding our jurisdiction, we thought that it was also necessary to secure the other party against the injurious consequences which might result from the keeping in force of the injunction during the pendency of the appeal. This was not prejudging the ultimate decision of the cause; this was not declaring that the injunction was legally and rightfully granted and sued out in the court below, and properly kept in force in the appellate court; this cannot be considered as granting a new injunction and as being thereby an undue assumption of original jurisdiction; the injunction already existed, its effect after the appeal had been disregarded by the lower court, and in accordance with our former opinion, we still think that, in order to reinstate it by a writ of prohibition, and to preserve to the appellant the ulterior benefit of his appeal, we had the power, in the exercise of our sound legal discretion, to require of him that he should furnish additional security against the consequences of the provisional effect of the injunction before the appellate court.

It is therefore ordered, adjudged and decreed that the rule be made absolute.

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FLOWER vs. MILLAUDON.

ESTABLISHED
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APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF

NEW ORLEANS.

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191	185
50	624
191	185
104	181
19	185
1123	103

Where A gave his own note to B for \$11,000 payable in 2 years, and received in payment the note of a third person endorsed by B, for \$10,000 payable ten days after his own: *Held*, that it was an agreement to give and receive usurious interest, and null.

An agreement to take even a legal rate of interest on a larger sum than is *really due*, is usurious.

So a contract to make cash advances and to receive ten per cent. interest thereon, and be entitled to one third of the profits of the firm to which the advance was to be made, was held to be usurious.

Accounts which have not been objected to and received by the party, although they contain extravagant charges for commissions and usurious interest, will not be re-opened in a suit for a final settlement and to recover a balance.— Usurious interest once paid cannot be recovered back.

Even where a promissory note is given for a balance of account, in an action between the original parties, the debtor may go into the consideration and content the account, but the burden of proof is on him, to show affirmatively errors or omissions.

An agreement, proved by the positive testimony of one witness, supported by many strong corroborating circumstances, will control the price of slaves, over the prices they were subsequently sold for at sheriff's sale.

Where a party has made himself liable to creditors by dealing with the firm, although not a partner, and who has paid a partnership debt, will be entitled to recover from the original debtors.

This is an action instituted by Wm. Flower, a partner of the firm of W. & D. Flower, against the defendant, for the settlement of various transactions had with said firm under a special agreement between the parties in 1833, by which said defendant agreed to make advances to the firm and receive one third of its profits. The case has already been before this court, and the general principles governing it, have been settled; but the court being unable to make up and determine on a correct balance, remanded it for another trial. *See 6 La. Rep. 697.*

On the return of the cause to the inferior court, the Parish Judge, after a full investigation of the accounts of the respective parties, gave judgment against the plaintiff: And on the reconventional demand of the defendant, there was judgment

EASTERN DIS. in his favor over against the plaintiff, for \$29,185 47, with
July, 1841. interest at ten per cent. on \$27,807, 85, from 31st March,
FLOWER 1831, until paid; and legal interest on the balance from 30th
vs. June, 1833, until paid.
MILLAUDON.

The plaintiff appealed.

The case was argued in the spring of 1838, and the following opinion pronounced the 4th June following; but a re-hearing was granted.

Worthington, Watts & Preston, for the plaintiff and appellant.

Grymes, for the defendant.

Bullard, J. delivered the opinion of the court.

The second trial of this case resulted in a judgment similar to that which was reversed by this court at a former term, when it was remanded for a new trial. Upon this second appeal the case comes before us with all the evidence adduced by the parties so as to enable us to pronounce finally upon the questions both of law and fact involved in the controversy.

In reviewing the judgment of the Parish Court the most convenient method will be to take up the claims of the plaintiff in reconvention, in the order in which they are recapitulated in his accounts and in the judgment itself.

1st. The balance of W. Flower's loan account amounting on the 31st March, 1831, to \$19,980 06.

2d. Balance of all accounts, with W. & D. Flower, amounting at the same period to \$4,480 16.

3d. The balance of W. Flower's commercial account, \$3,397 63.

4th. The amount of a judgment rendered against Millaudon in favor of M'Donald et al., for a debt due by the firm of W. & D. Flower, amounting to \$1,377 62, and now claimed in reconvention.

The aggregate of these four items forms the sum for which judgment has been rendered in favor of the plaintiff, in recon-

vention, and it now becomes our duty to analyze them in order to ascertain how much of the amount is made up of usurious interest, according to the principles assumed by us in our former judgment, and to what extent the original plaintiff has succeeded in showing errors or omissions in the various accounts between the parties.

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I. This first and largest item is made up of a principal of \$11,000, with interest at ten per cent. and compound interest from the year 1827. The history of the transaction from its origin, is clearly established by evidence. On the 22d of June, 1823, W. Flower gave his promissory note to Millaudon for \$11,000, payable on the 1st of May, 1824. The only consideration for it was a note of V. Nolte & Co., for \$10,000, transferred by him to Flower, payable on the 10th of May, 1824, that is to say, a few days after Flower's note would fall due. At the maturity of his note Flower stipulated to pay an interest of ten per cent. on the eleven thousand dollars.

If this latter sum was really and justly due, it is clear the stipulated interest was not above the rate permitted by law. The question therefore, whether the contract was usurious, must depend upon the character of the original exchange of notes; for if the defendant can recover the whole of the principal sum he is entitled to the interest.

The operation was a very simple one. If both notes had been paid at maturity, Millaudon would have gained one thousand dollars without disbursing a dollar. He gave no equivalent but his endorsement on Nolte's note for less than two years and obtained the note of Flower, secured by mortgage on a number of slaves. If instead of Nolte's note he had given the amount of it in money, less the discount at ten per cent., or, about eight thousand dollars, and received at the expiration of two years eleven thousand dollars, it is obvious he would have secured an interest of upwards of eighteen per cent. per annum. Suppose instead of transferring Nolte's note he had given his own, it would have amounted to a loan not of money but of his name, and for the purpose of raising

**Estates De
Rely, 1844.**

**FLOWER
vs.**

MILLAUDON.

Where A gave his own note to B for \$11,000 payable in 2 years, and received in payment the note of a third person endorsed by B, for \$10,000 payable ten days after his own: *Held*, that it was an agreement to give and receive usurious interest, and null.

An agreement to take even a legal rate of interest on a larger sum than is *really due*, is usurious.

So a contract to make cash advances and to receive ten per cent. interest thereon, and be entitled to one third of the profits of the firm to which the advance was to be made, was held to be usurious.

it by discount. That such was the true character of the transaction we are quite satisfied. Under such circumstances if Flower, at the maturity of his note, had contested the payment of it, on the ground of want of consideration as to the amount over ten thousand dollars, which he was to receive ten days afterwards on Nolte's note, would the defence have availed him? We think it would, and that only the principal sum could have been recovered. Nothing would be more easy than to evade the prohibition of usury, if we were to regard only the form of contracts, without any scrutiny into their real nature. An agreement to take even a legal rate of interest on a larger sum than is really due, has been held by this court to be usurious: *3 Martineau, N. S. 622.*

II. The second branch of the inquiry relates to the accounts between the defendant and W. & D. Flower.

The relations of the defendant with that firm commenced in 1822, under a contract by which the latter engaged to furnish \$20,000 in cash and endorsements of their notes of accommodation, for an interest of ten per cent. on the cash part of the advances, and one third of the profits of the concern. We

pronounced our opinion on a former occasion, that such a contract was usurious. We have heard, as argument to convince us that we were in error even on the hypothesis assumed by the parish judge on the last trial, that the interest applied exclusively to the cash advance, and the profits were intended as commissions for endorsing. In point of fact ten thousand dollars upon which the interest is charged, were not advanced at first in cash. Millaudon, it appears from the receipt given at the time, loaned them in cash one thousand dollars, gave his notes at sixty days for six thousand five hundred dollars and his endorsement on their note for twelve thousand five hundred dollars, amounting together as the receipt expresses it "to the sum of \$20,000, which loan is granted to us on the condition as per our agreement entered into this day with the said E. Millaudon." Admitting that the defendant's notes at sixty days were equivalent to cash, yet the money part of the

advance falls short two thousand five hundred dollars, of the sum promised; and yet the interest is charged on ten thousand, besides profits on the first year's commercial operations.

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99.
MILLAUDON.

In pronouncing on this part of the case, upon the first appeal, we neither intended, it is true, to direct the judge *a quo* what judgment he should render upon the new trial, nor to preclude a review of our own opinion, when all the evidence in the power of the parties should be before us, and after listening to all the arguments they might think proper to urge. Our examination of this point has brought us again to the conclusion, that so far as the defendant seeks, in this case, to recover the interest and profits under that contract, he cannot succeed. But whatever interest or profits may have been paid or are considered as paid, by the appropriation of funds in the hands of the defendant, with the assent of the plaintiff, cannot be recovered back by the plaintiff; 3 Martin, N. S. 622; 2 La. Rep., 431; 4 Idem, 544.

According to these principles the accounts between the parties, (some of them rendered by W. & D. Flower themselves,) up to the 10th November, 1823, when a balance appears to have been paid in cash, must be considered as settled and are not liable to be opened for the purpose of inquiring into the discount of the notes of Shaw and Rogers, and others, together with charges for commissions and insurance, of which much was said in the argument. If we were now to permit the opening of those accounts we should, in substance, permit the parties to recover back the discount voluntarily submitted to and paid, after the transaction had been finally closed. With respect to many items of commission charged in subsequent accounts, it may be remarked, that although those charges appear in some cases extravagant, yet the parties with whom they were transacted and who were legally capable of assenting to them, never having made any objection, although parties to this record, we are of opinion the accounts cannot be opened for the purpose of reducing them. But the charges for interest on the loan to the firm, and of profits on the commercial oper-

Accounts which have not been objected to and received by the party, although they contain extravagant charges for commissions and usurious interest, will not be re-opened in a suit for a final settlement and to recover a balance. Usurious interest once paid cannot be recovered back.

EASTERN DIS. ations, after the period at which an account appears to have
July, 1841. been settled and the balance paid, must be rejected.

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From the date above mentioned, up to the dissolution of the partnership of W. & D. Flower, in July, 1825, it does not appear that any final settlement took place.

On the 15th of March, 1827, W. Flower, the present plaintiff, approved an account furnished by the defendant embracing various transactions, and being in fact a continuation of accounts with W. & D. Flower. He seeks now to open that account with a view to show errors to the prejudice of the firm and himself. Even if he had given his promissory note for the balance, it is clear he might, in an action between the original parties, go into the consideration and contest the account. But the burden of proof is on him, to show affirmatively errors or omissions, and the presumption is in favor of the account as approved.

Among other items complained of is a re-draft of Le Roy, Bayard & Co. on Millaudon, on account of a transaction of W. & D. Flower, embracing \$406 78, commissions and interest charged by that firm. Millaudon had furnished his bill of exchange on the house in New York, at four months, for \$4,040 under an agreement to receive commissions at five per cent. for his responsibility, and W. & D. Flower agreed that Le Roy, Bayard & Co. might re-draw for the amount, with the addition of exchange, interest and commissions. It now appears in proof that there never was such re-draft, but that the first bill was paid at maturity and charged to Millaudon in his account current with Le Roy, Bayard & Co. That item therefore, except the five per cent. commissions, must be rejected. The amount of the original bill together with commissions is charged by the defendant.

III. We proceed to the third branch of the subject, to wit: the account between W. Flower and the defendant, which exhibits a balance against the former of \$3,397 63.

After the dissolution of the partnership it appears that the defendant continued to act as the factor of the plaintiff, sold

his crops and made the usual advances. The most important item in this last series of accounts, which has been much contested, is that which credits W. Flower with the price of certain slaves sold in pursuance of an order of seizure under a mortgage given to secure the amounts due to Millaudon, on account of the transactions which we have previously mentioned. It is contended by the appellant that he is entitled to a much larger credit on that account; that Millaudon agreed to take the slaves at a much higher price, and that the sale by the sheriff was resorted to by mutual consent, with a view to cut off other mortgages of a subsequent date.

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In support of these allegations he produces the testimony of one witness who deposes that the slaves in question, about twenty-six in number, were brought to New Orleans by W. Flower to be sold for the purpose of paying Mr. Millaudon; that the witness arrived here a few days afterwards, and on the return of W. Flower to Feliciana, he was charged with the negotiation. That Millaudon finally agreed to take the gang at \$11,000; they were thereupon sent up to his plantation. In corroboration of this statement it is proved that on the return of W. Flower to this city, the parties went before a notary to pass a sale, but that it was not done in consequence of a suggestion of the notary that the safest course for the purchaser would be to have a judicial sale, in order to cut off other incumbrances. The notary testifies that a memorandum was exhibited by the parties partly in the hand-writing of each, but that they went away and soon afterwards he learned the sale by the sheriff.

It is further proved by the captain of the steamboat on board of which the negroes were conveyed to the plantation of Mr. Millaudon, that he stated he had purchased them, and nothing was charged for their passage because Mr. Millaudon was a part owner of the boat. He called them his negroes; and David Flower, who testifies to the bargain and delivery, accompanied the slaves and Mr. Millaudon to the plantation. They were afterwards brought back to the city to be sold by the she-

EASTERN DIS. riff. It is further shown that the proceeding by order of seizure and sale was with the consent of Flower, and that he dispensed with any appraisement; and the sheriff testifies that the sale

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had the appearance of an amicable arrangement between the parties; and the impression on his mind was that the valuation of the slaves made by the parties must have been a different one from that ascertained by the sheriff's sale.

An agreement, proved by the positive testimony of one witness, supported by many strong corroborating circumstances, will control the price of slaves, over the prices they were subsequently sold for at sheriff's sale.

The positive testimony of one witness supported by so many strong corroborating circumstances: such as the acknowledgment of the defendant himself that he had purchased the slaves; their delivery to him at his plantation; the conduct of the parties at the office of the notary and at the sale by the sheriff; force conviction upon our minds that the agreement alleged by the plaintiff did exist, and that the subsequent sale by the sheriff was understood by the parties at the time as merely the means by which an unincumbered title could be conveyed. It is impossible to account for the conduct of both parties upon any other hypothesis. Neither party has chosen to resort to the conscience of his adversary touching this transaction, and that appears to us the only means by which it could be satisfactorily shown that the original agreement had been cancelled. We cannot censure therefore with the Parish Court in its conclusion, and are of opinion that the plaintiff is entitled to the credit claimed by him, less the expenses of the sale.

The note for \$750 33, which is objected to, is now shown clearly to have been given for a few months interest on the loan of \$11,000, and must therefore be rejected; but we think the objection to the discount on the notes for \$2500, according to the principles heretofore assumed by us, ought not to be sustained.

Independently of the interest account and after making all the allowances to which we think the parties entitled, we have reached the conclusion that under the three first heads there is due to the plaintiff in reconvention a balance of \$4033 46, which he is entitled to recover, independently of the judgment

against him in favor of a creditor of the firm, which we shall next proceed to examine. The above balance being made up of advances and secured by the mortgage which the plaintiff seeks to annul, for a specific sum, we think that interest at five per cent. should be allowed from judicial demand, that is, from the filing of the demand in reconvention.

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IV. We now proceed to consider the last question presented by this case, to wit: the right of the defendant to recover of W. Flower the amount of a judgment rendered against and paid by him in favor of a creditor of W. & D. Flower.

It appears that in consequence of the arrangement between the defendant and the parties to the contract, under which advances were made to the new house of W. & D. Flower, on a stipulated participation in the profits of the concern, it was considered by this court that Millaudon had made himself liable to third persons dealing with the firm, and the judgment in question was recovered. At the inception of the present suit one of the avowed objects of the plaintiff was to hold the defendant liable to him for losses sustained in that concern, and to apply the principle thus settled to his own case as a third person or stranger to the partnership. On a former appeal to this court these pretensions of the plaintiff were considered and we held "that Millaudon could not be regarded as a partner as it relates to the plaintiff, whatever his liabilities might be towards third persons." We further intimated our opinion that although William Flower was entitled to no profits *eo nomine*, but only an annual interest on the capital owned by him in the former concern, and which might be recovered by the new, yet we considered him to be a partner in the new house. It is now contended by his counsel that he was only nominally or ostensibly a partner; that he was entitled to no profits and took no active part in the concern, and that therefore he is not liable for any debts of the new concern in relation to Millaudon, who was perfectly well acquainted with his position, and the authority of Gow and Collyer on Partnerships is relied on; Gow, 27, 91, 32; Collyer, 43.

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The doctrine as laid down by those authors appears to be just and equitable, but its application to the case before us is not so clear. If both parties were merely ostensible partners in a commercial firm, each without any real interest as partners, it is difficult to perceive how one could have any recourse upon the other. Supposed to be acquainted each with the other's true character in relation to the partnership, neither could allege any implied promise on the part of the other to indemnify him for any liability he might incur towards third persons. But the present case presents other features and requires the application of other principles. The advances by Millaudon were to be made in the first instance to a firm of which the plaintiff was not only a partner but most deeply interested. It is true his principal object in connecting himself with the new concern was the liquidation of the old. But he bound himself personally for the reimbursement of the advances to be made by Millaudon during the whole time the partnership was to

Where a party has made himself liable to creditors by dealing with the firm, altho' not a partner, and who has paid a partnership debt, will be entitled to recover from the original debtors.

continue. It is therefore clear that if the latter had advanced the amount due to the creditor with the assent of the acting partners, instead of resisting a suit, he would have been entitled to recover against the present plaintiff under the contract. It is equally manifest that the creditor of the firm could have recovered against Flower. If a loss must fall on one or other of the parties, it appears to us equitable that it should ultimately rest upon him for whose interest and under whose guarantee the original liability was incurred.

For these reasons, we concur with the court below in the conclusion that the plaintiff in reconvention is entitled to recover the amount of the judgment in question in addition to the sum above expressed.

It is therefore ordered, adjudged and decreed that the judgment of the Parish Court be avoided and reversed; and proceeding to render such a judgment as should, in our opinion, have been given below, it is further ordered and decreed that the defendant as plaintiff in reconvention recover of William Flower the sum of six thousand and eleven dollars and eight

cents, with interest at five per cent. upon four thousand six hundred and thirty-three dollars and forty-six cents thereof, from the date of judicial demand, to wit: April 4th, 1831, and with a like interest upon one thousand three hundred and seventy-seven dollars and sixty-two cents from the second day of April, 1836,⁷ together with the costs of the Parish Court; those of the appeal to be paid by the appellee.

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FLOWER vs. MILLAUDON.

ON A RE-HEARING.

The acceptance of accounts by the party to whom rendered, is *prima facie* evidence of their correctness, and it is for him to show errors. The burden of proof is on him.

Grymes, for the defendant and appellee, being dissatisfied with the rejection of several material items in the defendant's account, prayed the court for a re-hearing.

Judge Watts, then at the bar, representing the plaintiff in part, who was also dissatisfied with the judgment, submitted various points on which a re-hearing was asked, in case a re-hearing was granted to the defendant.

A re-hearing under these circumstances was ordered by the court.

And now at the July term, 1841, the following judgment was pronounced, re-affirming the first or previous one.

Eustis & Potts, for the plaintiff.

Grymes, for the defendant.

Bullard, J. delivered the opinion of the court.

EASTERN DIS. A re-hearing having been allowed in this case, it has again
July, 1841. been argued and considered by the court.

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The principles of law, which after much reflection the court regarded as applicable to the case, have not been strenuously combatted on the last argument. The usurious character of the first agreement, by which the plaintiff in reconvention stipulated for ten per cent. interest on his advances, *and* one-third of the profits of the concern, appears to us clear, and consequently all the interest and profits charged, which have not been paid, were rejected; but a balance having been settled in cash on the 10th of November, 1823, we held that the accounts previous to that period could not be opened. Much has been said to satisfy us that the accounts between the parties are correctly stated in the numerous statements accompanied by vouchers, which are found in the record. Undoubtedly the acceptance of those accounts by Flower is *prima facie* evidence of their correctness, and it is for him to show errors. The burden of the proof is upon him. With respect to the Nolte note, which is the heaviest item, growing between the years 1824 and 1831, from a real capital of \$10,000, at an interest of ten per cent. upon eleven thousand and compound interest added annually, to upwards of nineteen thousand dollars, the evidence is entirely satisfactory. The note for \$733 33, shown to have been given for interest and the charge for re-draft by Le Roy, Bayard & Co., disproved by the account current of that house with Millaudon, were rejected. But the commissions charged, to which the acting partners had assented, were regarded by us as binding on the appellant. Taking the report of the experts as showing correctly the various items of interest and profits and rejecting such as according to the above principles were objectionable, and allowing Flower all the credits to which he shows himself entitled, and which in general are not contested, but were imputed to the over-charges of usurious interest and profits, we found the amount for which the first judgment was rendered. We have not been convinced that we came to an

The acceptance of accounts by the party to whom rendered, is *prima facie* evidence of their correctness, and it is for him to show errors.—The burden of proof is on him.

erroneous conclusion, or that there is any material mistake in the calculation.

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The part of the case which has been most earnestly contested is that which relates to the additional credit claimed by Flower on account of the slaves sold by the sheriff under an order of seizure and sale. We are unanimously of opinion that the credit was properly allowed in the judgment first pronounced. All the circumstances of the case, especially the facts, that the order of seizure was obtained by consent of parties, that the slaves were in possession of Millaudon, that the sale was without appraisement, and that there had been a previous agreement as to the price, and a delivery of the slaves and an understanding that there should be a sheriff's sale in order to cut off mortgages subsequent to that of Millaudon, all these circumstances satisfy us that Flower was not to lose by the sheriff's sale and that it was resorted to by mutual consent, as the means by which an unincumbered title could be given.

On the other hand, the correctness of our judgment by which we held the appellant liable to Millaudon for the sum recovered of him as a secret partner of the commercial firm has been combatted. But upon mature consideration we are not satisfied that we were in error.

It is therefore ordered that the judgment first rendered remain undisturbed.

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SKIPWITH vs. HIS CREDITORS.

APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, FOR THE
PARISH OF EAST BATON ROUGE, THE PARISH JUDGE PRESIDING.

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A judgment obtained in the last resort is final and conclusive between the parties to it; although it may not be so as to third persons: Nor can a change by the common debtor making a surrender, affect the rights of the judgment creditors who have a privilege or mortgage on the property ceded.

Testimony contained in a deposition must be disregarded which goes to show any thing contrary to or explanatory of a judgment between the parties; but may be proper to prove that one of the parties was in possession of a separate estate.

The record of a suit and judgment is admissible in evidence to show that it was rendered against a party who had surrendered certain slaves to be sold, although it might be insufficient *per se* to prove she had a title to them.

Acts or deeds under private signature, acknowledged before the mayor of a city, are *inadmissible* as evidence, when it is not shown he had authority to take the acknowledgment of witnesses to such acts or deeds.

The record of a suit pending in the Supreme Court of another State, is inadmissible in evidence when it is irrelevant and tends to controvert a judgment between the same parties in this State.

It is not enough that a party renders his rights and claim probable in a court of justice, he must make them legally certain.

On the 29th May, 1821, Fulwar Skipwith presented his petition with a bilan or schedule annexed, containing a detailed statement of his debts and claims of his creditors, also assets, property and effects, of every kind, which he surrendered for the benefit of all his creditors, and prayed for the usual stay of proceedings, and for general relief under the insolvent laws relating to voluntary surrenders.

Among the creditors placed on the bilan were Wm. Russell of Great Britain, by notes and mortgage for \$11,500; amount due the heirs of Joshua Follansbie of Massachusetts, deceased, with interest \$2,100. Due Louisiana State Bank by note and mortgage \$2,400; due Mrs. Louisa V. Skipwith, \$26,000 being the supposed proceeds of 640 acres of land, &c., and 11 slaves, being her property and sold to Josias Gray, with other slaves of F. Skipwith, on the 23d October, 1819.

There was a meeting of creditors who appointed John

Buhler, Esq. of Baton Rouge, syndic. On the 11th June, 1832, the syndic filed his tableau of distribution. The amount for distribution in hands of the syndic was \$11,462 and \$1,375 for future distribution. The privileged claims amounted to \$2,166. Russell's heirs by special mortgage on proceeds of property sold were put down for \$8,209; leaving a balance of their claim of \$14,538 for which they are placed as ordinary creditors.

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Mrs. L. V. Skipwith was placed as a creditor by special mortgage for \$748, as having been paid by her to the Bank of Louisiana; and as an ordinary creditor for \$5,263 paid by her to the heirs of Joshua Follansbie; and also for \$26,000 as due her in her own right.

Russell's heirs and Mrs. Skipwith both made opposition to the tableau, and also to each other's claims. There was some other oppositions, but the two first mentioned are all that are material to be stated as the case now comes before this court. The nature of the claims of each party, the evidence produced, and the questions of law raised thereon are fully stated in the opinion of this court. The debt or claim of Russell's heirs has been severely contested in the trial of the present case, although liquidated and settled by a judgment of the court of the last resort. See the case of *Rawle for the use of Russell vs. Skipwith and wife*, reported twice in 8 *Martin N. S.* 118, 407. It was three times before the Supreme Court. The first opinion and judgment given, which was at the June term, 1828, has never been reported or published. It is now published for the first time, as an omitted case.

There was judgment confirming and homologating the tableau as relates to the heirs of Russell; also, for the mortgage claim of Mrs. Skipwith for \$748, and her ordinary claim of \$26,000; but rejecting her claim in right of and as subrogated to Follansbie's heirs. She appealed.

Ogdens, Elam & Barton, for the appellant, insisted that the judgment of Russell's heirs was not *res judicata* in this

EASTERN DIS. case. F. Skipwith was no party when it was rendered; having made a surrender. Mrs. Skipwith was not competent to

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2. The appellant was subrogated to Follansbie's right of mortgage, having paid his debt, and should be preferred for the amount of this claim.

Thomas Gibbes Morgan, for Russell's heirs, contended that Mrs. Skipwith and her husband were in court when he failed; and she was competent to carry on the defence of the suit. She had bound herself *in solido* for the debt, and renounced her right of mortgage. Judgment was properly rendered against her for the entire debt. She cannot contest the validity of either the judgment or the claim settled by it.

2. The debt paid to Follansbie's heirs was one for which Mrs. Skipwith was already bound to pay, and she cannot make any claim on the property surrendered, either by subrogation or otherwise.

3. There is no legal evidence or proof of her claim against the estate of her husband. Her opposition should have been rejected, and the claim erased from the tableau.

Bullard, J. delivered the opinion of the court.

The syndic of the creditors of Skipwith, filed a tableau of distribution in which the heirs of William Russell were classed as mortgage creditors, and entitled to the whole amount of the proceeds for which the property sold on which they had a mortgage, by assignment from the insolvent and his wife, to wit: \$6209. Mrs. Skipwith was set down as subrogated to the mortgage of the Bank of Louisiana on property surrendered, the proceeds of which are more than sufficient to discharge the mortgage, being one-half the sum paid by her as joint obligor with her husband. She is further put down as a creditor for \$26,000, and the heirs of Russell for \$14,538 78, as the balance of his claim after exhausting the mortgaged property. And Mrs. Skipwith

for a further sum of \$5263, paid by her to the heirs of Follansbie. It is unnecessary to detail any further the claims which figure on the tableau, inasmuch as the questions involved in the case now before us relate altogether to the conflicting claims of Russell and Mrs. Skipwith, either in her own right or as assignee of Follansbie.

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Mrs. Skipwith filed an opposition to the claim of the heirs of Russell, in which she alleges that besides her claim in virtue of her subrogation to the Bank of Louisiana, she is also a creditor of the estate to the amount of \$5263, for a debt of her husband paid by her to the heirs of Follansbie, for which she is legally subrogated and has the first and highest privilege and mortgage upon the whole estate of her husband; that she was coerced to pay said debt, notwithstanding the legal pleas and exceptions opposed by her, and she alleges that the act of assignment by her to Follansbie in 1820 was made in ignorance of her rights and to secure a debt of her husband. She alleges that she is further a creditor of her husband for the sum of \$12,500 with the highest privilege and mortgage, which she alleges she paid to Daniel Clark, from the proceeds of fifty thousand acres of land on the Ouachitta, a part of her separate and paraphernal estate. She further alleges that the debt due to her by Gray, secured by mortgage on lands and slaves sold by her to him, to wit: \$45,000, was a part of her paraphernal estate, and that her assignment to W. Russell of a part of the money thus secured by mortgage was made by her in ignorance of her rights to secure a debt due by her husband, and that a certain judgment alleged by Russell to have been obtained by him against the opponent, decreeing to him his recourse upon the said assignment for \$11,500, was obtained by surprise without her being heard in her defence; that the judgment is an interlocutory or provisional one merely and not definitive or final, and is open to all legal defences. And she avers that the claim of said Russell, if any he have, is upon six promissory notes made to him by the ceding debtor for his own separate debt. She further alleges that the judgment above mentioned was rendered

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and signed after the cession of goods. The opposition embraces other matters which have either been expressly abandoned or not noticed in argument, and which consequently it is unnecessary to set forth.

To that part of the opposition, which relates to the effect and validity of the judgment by which the assignment to Russell was held to be valid and binding on Mrs. Skipwith, the heirs of Russell set up the exception of *res judicata*; and this presents the first question which it is proper to examine in this case.

The judgment which it is averred forms the authority of the thing adjudged, was pronounced by this court at the January term, 1830, in the case of Rawle for the use of Russell vs. Skipwith and wife, and is reported in 8 Martin, N. S., 407. The court held that the obligation which the wife contracted for her husband was negated by the acceptance of an assignment of a debt due by Gray, and that the assignment on the property mortgaged by Gray ought to be enforced. The formal decree of this court was "that the assignment by the defendant, L. V. Skipwith, to plaintiff, of a portion of the mortgage of Josias Gray to herself and husband on the 8th of September, 1821, be considered good and valid to the amount of \$11,500; and it is further ordered and decreed that the plaintiff be at liberty to exercise against the land and slaves mentioned in said act of mortgage from Josias Gray to defendant, all rights of action which she, the said Louisa V. Skipwith, could or might of right exercise had the assignment mentioned in this decree of that part of said mortgage never been made."

It was in pursuance of this judgment that the heirs of Russell provoked the sale of the mortgaged property, the proceeds of which are in controversy between them and Mrs. Skipwith; and the question is, whether she be precluded from setting up any claim which might tend to defeat her assignment, thus adjudged to be valid and binding upon her. We cannot doubt the conclusiveness of this judgment upon the parties. It was pronounced by the court of the last resort, and we cannot look

behind it. Nor do we understand how this judgment can be considered merely as *provisional*. It is said by the senior counsel of Mrs. Skipwith, in an ingenious argument, that the land and slaves subject to the mortgage had been already ceded to the creditors, and the concurso had been formed, and the first step should have been to have had this *provisional* judgment made final by having the privilege, if any, established contradictorily with all the creditors. To this it may be answered that a judgment may well be final and conclusive between the parties and not so as to third persons; and the object of this proceeding is to give effect to that judgment against third persons unless good cause can be shown to the contrary. The mortgaged premises *pendente lite* were surrendered to the creditors, but it is clear that such a change could not affect the rights of the mortgagee or of the heirs of Russell as assignees. If their mortgage existed before the surrender it still existed into whosoever hands the property might pass, until sold at a regular syndic's sale, for the purpose of paying the debts of the insolvent. Every judgment may in that sense of the word be regarded as provisional only; that is to say not conclusive upon persons not parties.

The judgment in question authorizes the heirs of Russell under the assignment to exercise any action which Mrs. Skipwith, the original mortgagee and assignor, might have done, if no assignment had been made. They had therefore a right to cause the mortgaged property to be sold and to pay themselves the sum of \$11,500, out of the proceeds, and no interference of Mrs. Skipwith could defeat that right. The property having gone into the hands of the syndic, the heirs of Russell retain their right to be paid out of the proceeds of the sale by preference as mortgage creditors.

In homologating the tableau, so far as relates to this claim, we think the District Court did not err.

The heirs of Russell on their part filed an opposition to the claims of the widow. They deny her claims either as a privileged or ordinary creditor; and this opposition brings before

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the court the whole merits of the case as between the two opposing creditors. The opposition of Banks need not be noticed as he is not before us, the only appellants being the widow Skipwith and the heirs of Russell. We will consider her claim first as it relates to the payment alleged to have been made by her to the heirs of Follansbie and her subrogation to their rights, which was rejected and disallowed by the court below, and secondly, as to the debt due to the Bank of Louisiana and paid by her but disallowed by the court below, and lastly, as to the amount allowed her on the tableau and by the judgment of the District Court, as a privileged or mortgage creditor.

1st. It is contended, that the heirs of Follansbie had an anterior claim by assignment, of a part of the mortgage of Josias Gray, and that Mrs. Skipwith having paid said claim to the amount of upwards of \$5000, became thereby subrogated to the rights of Follansbie on the proceeds of the mortgaged property, and must be paid in preference to the heirs of Russell. Admitting the facts to be as here stated, it would by no means follow that Mrs. Skipwith would have a right to be paid in preference to the heirs of Russell. Follansbie had but an installment of the same mortgage, and if he were now before the court claiming to be paid out of the proceeds of the mortgaged property, he would at most be entitled to come in concurrently with Russell, an assignee of such installment. But in point of fact, it appears that the payment was made in pursuance of a judgment rendered against her as a joint debtor. That judgment must be held to be conclusive upon her as to creditors, and the payment consequently extinguished the mortgage *pro tanto*. The court did not therefore err in rejecting the claim.

The record abounds in bills of exceptions, presenting various questions of law touching the admissibility of evidence, which it is difficult to classify in such a manner as to condense our remarks upon them. The trial was however by the court, and as all the evidence was admitted notwithstanding the numerous objections, and is now in the record, we may well

disregard such as we think ought to have been rejected, as EASTERN DIS. July, 1841. illegal, and give effect to that which was in our opinion admissible, without remanding the case, if we should be of opinion that any was improperly admitted.

I. & II. The first and second bills of exception relate to the admissibility of the return of a commission, with the depositions of Mrs. Harris, A. Hennen, and others, which was objected to on various grounds, some of which relate to the character of the evidence itself, and some to the manner in which the commission was executed. It was objected that certain cross interrogatories had not been answered, but it appears upon inspecting the depositions that they were answered. The depositions were therefore in point of form admissible; but so far as the testimony went to show any thing contrary to or explanatory of the judgments rendered in the cases of Follansbie or Russell or is merely hearsay, it ought to be disregarded, but to have its proper weight so far as it tends to prove that Mrs. Skipwith was in possession of a separate estate.

III. We are of opinion that the record of the case of the Bank of Louisiana *vs.* Skipwith and wife, was properly admitted in evidence notwithstanding the objection that the mortgage annexed showed that the slaves belonged to Skipwith, and that the sheriff's return was no legal evidence to show property in Mrs. Skipwith, although it showed that she had surrendered the property to be sold. The record was admissible to prove the transaction itself, although it might not be sufficient *per se* to prove title in Mrs. Skipwith.

IV. We are of opinion that the acts under private signature annexed to the deposition of Brockenborough are not duly proved and ought not to have been received in evidence; nothing shows that the mayor of Richmond has authority to take the acknowledgement of witnesses to such deeds, so as to render them authentic evidence, without proof by such subscribing witnesses on oath when the deed is produced as evidence of title. The deposition itself which appears to have been taken by the mayor as commissioner named in the *dedi-*

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Testimony contained in a deposition must be disregarded which goes to show anything contrary to or explanatory of a judgment between the parties; but may be proper to prove that one of the parties was in possession of a separate estate.

The record of a suit and judgment is admissible in evidence to show that it was rendered against a party who had surrendered certain slaves to be sold, although it might be insufficient *per se* to prove she had a title to them.

Acts or deeds under private signature, acknowledged before the mayor of a city, are inadmissible as evidence, when it is not shown he had authority to take the acknowledgement of witnesses to such acts or deeds.

EASTERN DIS. *mus*, was properly received, reserving all exceptions to the July, 1841. competency of such evidence.

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V. It follows from what we have already remarked of the conclusiveness of the judgment rendered by this court in the case of Rawle for the use of Russell *vs.* Skipwith et al., that an affidavit made by her in the progress of that suit in the District Court, with a view to obtain a continuance, was properly rejected when offered in support of her opposition in the present case.

The record of a suit pending in the Supreme Court of another State, is inadmissible in evidence when it is irrelevant and tends to controvert a judgment between the same parties in this State.

VI. We are of opinion that the court erred in admitting in evidence the record of a suit heretofore pending in the Supreme Court of Pennsylvania, between Russell & F. Skipwith, although it appears to have been duly authenticated according to the act of congress; because it was either entirely irrelevant or tended to controvert the judgment of this court in the case of Russell's heirs *vs.* Skipwith and wife.

VII. The depositions of Michel and Relf were objected to on the ground that cross interrogatories propounded by the heirs of Russell had not been answered; but from an inspection of the deposition it does not appear that the objection was well founded. There being in point of fact, answers to cross interrogatories.

It is not enough that a party renders his rights and claim probable in a court of justice, he must make them legally certain.

It certainly appears that the parties were separate in property by the marriage contract, and that funds were invested belonging to the wife in the purchase of slaves. But the proof is not sufficient, in our opinion, to establish her claim to the sum of \$26,000 which she demands as a simple debt against her husband, contradictorily with the creditors. The evidence is vague and indefinite; it is not enough that a party renders his right probable, he must make it legally certain. The marriage contract does not show that the wife brought property of any value into marriage, and only a small amount came to her from her mother's succession, which she herself appears to have received. In short, the legal evidence in the record has failed to satisfy us that the husband's estate

is chargeable with the sum of \$26,000 which has been allowed EASTERN DIS.
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on the tableau as a simple debt.

It is therefore ordered and decreed, that the judgment of the District Court so far as it orders the claim of Louisa V. Skipwith for \$26,000 to be paid out of the funds in the hands of the syndic, be reversed and annulled, and that the same be stricken from the tableau of distribution.—And that it is further adjudged and decreed that in all other respects the judgment be affirmed; and that the tableau thus amended be finally confirmed and homologated, and that the costs of the appeal be paid out of the mass of the estate.

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19L 207
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[AN OMITTED CASE.]

RAWLE TO USE OF RUSSELL vs. SKIPWITH ET UX.

APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT FOR THE PARISH OF
EAST BATON ROUGE, JUDGE PATILLO OF THE EIGHTH PRESIDING.

Where all the promises and contracts are set out in the pleadings, if any one of them will authorize judgment, the court should render it. Irrelevant or useless matter does not vitiate the good.

The party having the legal title may sue for the benefit of whom he pleases; in the same manner as he might dispose of the funds after judgment if he sued in his own name.

Where a case is dismissed on an exception *in limine litis*, the Supreme Court cannot examine it on the merits. It must be remanded for a new trial.

On the 21st May, 1827, Wm. Rawle of Philadelphia to the use of W. Russell, of Great Britain, sued F. Skipwith and wife for a debt of \$11,500, secured by mortgage, in which the wife renounced her rights on the mortgaged property, in favor of the mortgagee. It was executed the 8th September, 1821, and declares, "that L. V. Skipwith, authorized by her husband, F. Skipwith, Esq., and also acting in his own name, do declare and acknowledge that they are justly indebted to Wm.

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Rawle, of Philadelphia, in the sum of \$11,500," &c. The defendants severed in their pleadings. Both pleaded a novation of the debt, and excepted to the manner of proceeding and to the action. The exceptions were sustained; and on the 16th July, 1827, there was judgment dismissing the suit. The plaintiff appealed.

Thomas Gibbes Morgan, for the plaintiff and appellant.

Gurley & Lobdell, for the defendants.

Mathews, J. delivered the opinion of the Court.

Skipwith the husband, being indebted to Wm. Russell, of the kingdom of Great Britain, made and executed in favor of Wm. Rawle, of Philadelphia, his attorney in fact, on the first day of May, 1818, six several promissory notes, payable at different times, or annual installments, for the sum total of \$11,500. The last installment or note became due in January, 1824. In December, 1819, the defendants sold to one Josias Gray, for \$45,000, payable at several installments, a plantation and slaves, situate in the parish of East Baton Rouge. In the act of sale, they retained a mortgage until perfect payment. Some time after the sale (the record does not state the precise period) the defendants appeared before a Notary Public, and by an instrument of writing executed before him, declared that they were justly indebted to him (Rawle of Philadelphia,) in the sum of \$11,500, for which they bound themselves *in solido*; and for the better securing thereof assigned and transferred to Rawle as much of the debt due them by Gray as would satisfy the obligation thus entered into. The act concludes in these words: "This act is passed to secure the payment of six notes all executed the first day of May, 1818, amounting together to the said sum of \$11,500, which notes are not here to be delivered up to the obligors: It is therefore understood that they are discharged by this act, and are to be destroyed and delivered up to the obligees, on or before the time the first payment becomes due, as mentioned in this act." To this instru-

ment the names of the defendants are affixed. Nothing shows, however, that it was accepted or assented to by the obligee, at the time it was made, nor at any subsequent period, up to the commencement of this suit. An additional contract was entered into by one of the obligees, which adds another feature to these transactions. From some cause or other Gray did not comply with the condition of the sale made to him by the defendants, and in December 1826, he sold to one of them (Skipwith the husband) the plantation and slaves he had previously purchased from him and his wife. In this act Skipwith binds himself and promises to pay to Rawle the \$11,500 with interest; part of the debt due by Gray, which had been assigned by the obligees, as already stated, to Rawle. Thus we find the plaintiff to have obtained three different obligations for the debt due to him. *First*, the note of the husband: *second*, the assignment of a debt due to the husband and wife: and *third*, the obligation of the husband to pay the debt so assigned. The petition in this case sets out these different acts and states that the defendants are indebted to the petitioners in the sum of \$11,500, with interest at the rate of six per cent on the original notes from the time they respectively became due, until the first day of March, 1822. From that time until the first day of March, 1824, at ten per cent.; and from that date until paid, at five per cent. The petition concludes with a prayer for judgment against them *in solido*; and that the petitioner may be declared to have a mortgage on the land and slaves sold by the defendants to Gray, and by Gray re-sold to Skipwith. The defendants pleaded separately. The husband averred;

1st. That the notes sued on, had been novated by the assignment made to the plaintiff of the debt due by Gray; and that the ordinary hypothecary action must be commenced against him.

2d. That the suit is brought for the use of Russell, when it ought to be for the payee Rawle.

3d. That the action of mortgage cannot be maintained directly against the defendant, because the plaintiff's right of mort-

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gave to it is derived from an assignment of the defendant and wife against Gray; and the re-transfer or sale from Gray to the defendants does not confer a right on the plaintiff to exercise the actions directly against the defendants.

The wife pleaded;

1st. That the debt had been novated by the assignment of the debt on Gray.

2d. That the suit should have been brought in the name of Rawle and for his own use and benefit.

3d. That she contracted the debt for the benefit of her husband, and as his surety, and is not bound.

4th. That the plaintiff had accepted Gray as his debtor, and that she had not become a party to any subsequent act by which she became responsible for the debt. The assignment of the debt due by Gray was made on the condition that the six notes should be given up or destroyed.

The plaintiff, by bringing suit on the assignment and claiming the benefit of it, has ratified and confirmed the condition on which it was made. The District Court therefore did not err in considering there was a novation of the debt due by these

Where all the promises and contracts are set out in the pleadings, if any one of them will authorize judgment, the court should render it. Irrelevant or useless matter does not vitiate the good.

notes. But we do not see how the novation of these notes destroys the plaintiff's action in the form it is presented. All the contracts and promises are set out in the pleadings; and if any one of them will authorize judgment against the defendants, it is the duty of the court to render it. The irrelevant matter in the petition does not vitiate that which is good. We see no ground whatever for the second objection. The legal title is in Rawle, and he may sue for whom he pleases, in the same manner he might make any disposition he chose of the funds

The party having the legal title may sue for the benefit of whom he pleases; in the same manner as he might dispose of the funds after judgment if he sued in his own name.

after judgment, if he had sued in his own name. And as to the exception in relation to the hypothecary action, that the defendant Skipwith, who is the principal debtor, must be considered as a third possessor, because the property mortgaged to him by Gray has come into his hands by a re-transfer of the mortgage, we cannot examine it now, because the right of mortgage must depend on the plaintiff's establishing his debt:

And whether that be due or not we cannot decide ; for when a cause goes off in the court below on an exception taken in *limine litis*, it cannot on appeal be examined on the merits. Although the court decided correctly that the notes set out in the petition were novated, it erred in dismissing the cause ; as there is sufficient matter set out in the pleadings to authorize a judgment independent of them.

It is therefore ordered, adjudged and decreed that the judgment of the District court be annulled, avoided and reversed ; and it is further ordered, adjudged and decreed that this cause be remanded to the District Court to be proceeded in according to law ; the appellee paying the costs of this appeal.

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Where a case is dismissed on an exception in *limine litis*, the Supreme Court cannot examine it on the merits. It must be remanded for a new trial.

BUCKNER, STANTON & Co. vs. WATT.

APPEAL FROM THE COMMERCIAL COURT OF NEW ORLEANS.

The mere taking a new security, or bill, which does not mature until after the one sued on becomes due, is not such an agreement to give time, as will release the endorser, or which suspends the remedy or rights of the holder.

The express declaration of legislative will, must control the general rules of evidence, and testimony admitted contrary to the express provisions of a statute will be rejected.

The rule in relation to the competency of witnesses, is to be governed by the *lex fori* ; with some exceptions in favor of the local law.

A statute which expressly excludes the drawer of a bill from being a witness in a suit by the holder against the endorser, will not be construed to apply to the acceptor. This law being in derogation of the settled rules of evidence, will not be extended beyond its letter.

So an acceptor, who is without interest in a suit by the holder against the endorser of a bill, is a competent witness.

This is an action by the holders of a bill of exchange for \$5543 14, drawn by Harper, Carpenter & Co., of Mississippi, the 4th March, 1837, payable 60 days after date, drawn on

EASTERN DIS. and accepted by Messrs. Bier & Steever, of New Orleans, in
July, 1841. favor of and endorsed by Summers & Watt, residing at Grand
BUCKNER, Gulf, in Mississippi. The suit was commenced by attachment,
STANTON & CO. the 5th December, 1839, against Hugh Watt, one of the en-
VS. dorsers; and also against Bier & Steever, the acceptors, and
WATT. judgment prayed against all of them *in solido*, for the sum of
 \$4,848, the balance due on said bill, and interest and costs.
 Nugent, Turpin & Watt were made garnishees.

The defendant, Watt, admits the endorsement on the bill, and pleads a general denial. He avers, that the drawers of the bill sued on, placed in the hands of the plaintiffs, as collateral security, a bill of exchange, drawn by R. B. Wiggins on and accepted by W. P. Ringe, and endorsed by Harper, Carpenter & Co. and on C. C. Mayson, due in Gallatin, Mississippi, on the 1st January, 1838, for \$3316 53, and in consideration thereof the plaintiffs gave further or a prolongation of time to the drawers, without the consent or knowledge of the endorser, and by which he is discharged, &c.

The cause was tried on these pleadings and issues principally, and against Watt alone; Bier & Steever, not being cited, did not appear. There were several bills of exception to the admission and rejection of witnesses and of evidence, which are fully stated in the opinion of the court.

There was judgment for the plaintiffs for the sum claimed as due on the bill, and for damages, and interest and costs. The defendant appealed.

G. B. Duncan, for the plaintiffs and appellees.

Thomas Slidell & Roselius, for the appellant.

Morphy, J. delivered the opinion of the court.

The defendant as a member of the firm of Summers & Watt, is sued upon a bill of exchange of \$5543 14, drawn in Mississippi by Harper, Carpenter & Co., upon and accepted by Bier & Steever, of New Orleans, in favor of the said firm of Summers & Watt, by whom it is endorsed. The answer avers,

that defendant's liability has been extinguished by the acts of the holders, the present plaintiffs. That the drawers did place in the hands of plaintiffs as collateral security for the draft in suit, R. B. Wiggin's acceptance of a bill drawn by W. P. Ringe, and endorsed by C. C. Mayson and Harper, Carpenter & Co., due in Gallatin, Mississippi, on the 1st of January, 1838, for \$3316 53; and that in consideration of said collateral security so received from the drawers, the plaintiffs did give time to the said drawers, without the knowledge or assent of the defendant, *for a long time*, after the maturity of the first draft. The answer further alleges, that after the maturity of this collateral security, the plaintiffs, without the knowledge or consent of the defendant, did return and deliver up the same to the drawers, &c. Under these pleadings the parties went to trial below, and defendant prosecutes this appeal from a judgment rendered against him.

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The record shows no evidence of any agreement, by which the plaintiffs have given time to the drawers so as to preclude or suspend their right of suing on the original draft; had this been done, it must undoubtedly have had the effect of discharging defendant's liability; 3 Martin, N. S., 596; Millaudon vs. Arnous et al.; 6 Peters, 250; U. S. Bank vs. Hatch. In the absence of any such express argument, it is said, that plaintiffs' engagement not to sue the drawers, must be inferred from their receiving from the latter collateral security payable at a future day. Such an inference does not, in our opinion, necessarily follow. A debtor may put such security in the hands of his creditor, in hopes of obtaining some indulgence or respite, without there being any engagement not to sue on the part of the latter. He might receive a new draft with a view to raise funds with it, without binding himself not to sue on the first bill. In *King vs. Clarkson*, a case analogous to the present, C. J. Abbott said: "The broad and plain rule hitherto laid down in such cases, is this: if the holder of a bill of exchange consents to give time to the acceptor, he thereby discharges the other parties to the bill. I am of opinion, that the defendant

EASTERN DIS. is not discharged merely by the fact of Gidden & Son taking
July, 1841. another security, without any proof of a consent on their part,

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not to sue upon the first, until the second bill became due." It does appear to us, that when an agreement of this kind is sought to be established by circumstantial evidence, it should be such as to leave no room for doubt, and it must be an agreement in a legal sense, *i. e.* one which in law ties up the hands of the holder, and suspends his remedy or rights. 2 Vermont Rep., 129; Ripley vs. Greenleaf; 8 East's Rep., 575; Gould vs. Robson.

The mere taking a new security, or bill, which does not mature until after the one sued on becomes due, is not such an agreement to give time, as will release the endorser, or which suspends the remedy or rights of the holder.

The other ground assumed by defendant is, that he is discharged either entirely or *pro tanto* by the act of plaintiffs, in subsequently giving up this collateral security to Harper, Carpenter & Co., without his consent or that of his firm; the latter being mere accommodation endorsers, and standing in the position of sureties to the drawers. The facts, upon which this part of the defence rests, are established by the testimony of Harper and Carpenter, but it was excepted to on the ground, that they were parties to the bill sued on. Under the well established doctrine, that being equally responsible to both plaintiffs and defendants, the makers of a bill are to be viewed as being without interest, we would have no doubt about their competency, but our attention has been drawn to an act of the legislature, passed in the year 1823, and to be found in 1 Moreau's Dig., 624. It provides, that "the drawer of a note, bill of exchange, or other negotiable paper, shall never in any case whatsoever, be admitted as a witness in any civil cause or suit brought by the holder of any such note, order, bill of exchange or other negotiable paper, against any of the endorsers of said note, order, bill of exchange, or other negotiable paper, for the recovery of the capital and legal interest of the said note, order, bill of exchange, or other negotiable paper."

The express declaration of legislative will, must control the general rules of evidence, and testimony admitted contrary to the express provisions of a statute, will be rejected.

With such an express declaration of the legislative will before us, we are bound to decide, that the testimony was wrongfully received. But it is insisted, that the evidence was properly admitted, notwithstanding this statute, because the bill was

drawn in Mississippi, and by the laws of that State the drawers were competent to testify. We believe, that in regard to witnesses generally the rule is, that their competency is governed by the *lex fori*; although there may be cases, which form exceptions to this rule, and in which the local laws must govern. This is not, in our opinion, one of the cases. It occurred to us, that as this testimony seems to have been received below in consequence of both the counsel and the court overlooking a statute, which lies, as it were, concealed in Moreau's Digest, under the head of *Juries*, and has not hitherto been generally known on that account, we would have been justified in remanding the case, to afford the defendant an opportunity of offering other testimony to the same facts; but as it might be said, that counsel in the management of their cases must take the risk of the ultimate decision of this tribunal in relation to the legality of the evidence they introduce, we prefer sending back this case, on a ground furnished us by another bill of exceptions in the record. Steever, of the firm of Bier & Steever, the acceptors of the draft, was offered to prove, that the plaintiffs had discharged the defendant by giving time to the drawers, Harper, Carpenter & Co. It was objected, that Steever was incompetent, being a party to the suit. An examination of the record has convinced us, that the objection has been improperly sustained: although mentioned in the petition. Bier & Steever have never been cited. One is not, in contemplation of law, a party to a suit, until he has either appeared or been cited to appear in it. But it is urged, that the statute of 1823, excluding as witnesses the drawer of a bill, should apply also to acceptors, though not mentioned in the exclusion. This law being one in derogation of the settled rules of evidence in these matters, should not, in our opinion, be extended beyond its letter. The witness stood without interest in the suit, and was not to be affected by any judgment rendered in it. An acceptor is absolutely bound to all the previous parties, and nothing can discharge him, but payment or release; 7 Martin, N. S., 368; 3 Kent's Commentaries, 85.

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The rule in relation to the competency of witnesses is to be governed by the *lex fori*; with some exceptions in favor of the local law.

A statute which expressly excludes the drawer of a bill from being a witness in a suit by the holder against the endorser, will not be construed to apply to the acceptor. This law being in derogation of the settled rules of evidence, will not be extended beyond its letter.

So an acceptor who is without interest in a suit by the holder against the endorser of a bill, is a competent witness.

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It is therefore ordered, that the judgment of the Commercial Court be avoided and reversed, and that this case be remanded for further proceedings, with instructions to the judge below, not to reject the testimony of Steever; the costs of this appeal to be borne by the appellees.

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ON A RE-HEARING.

Contracts are to be decided by the law of the place where made; but there is an exception, which is that no nation is bound to recognize or enforce contracts which are injurious to its interests or people.

So, a statute of this state derogating from the established rules of evidence among nations will be executed and obeyed, as to contracts made in other states, when they are sought, be enforced here.

Thos. Slidell, for the defendant and appellant, prayed a re-hearing in relation to the point involved, by the offer of the testimony of Harper & Carpenter, the drawers of the bill sued on who are expressly excluded on the score of incompetency by the statute of March 27, 1823. The counsel contended that as the bill was drawn in Mississippi, that the contract arose there and should be governed by the laws of that state, which admitted the drawers of bills as competent witnesses, &c.

A re-hearing was granted, "but confined to the point of the admissibility of the drawers of the bill as witnesses, notwithstanding the statute of 1823."

The case was argued by *Thos. Slidell and Roselius*, for the appellant, and by *G. B. Duncan*, for the appellees.

Garland, J. delivered the opinion of the court.

The application for a re-hearing in this case was granted EASTERN DIS. July, 1841. exclusively on the point, whether the evidence of Harper and Carpenter, who were two of the firm of Harper, Carpenter & Co., the drawers of the bill sued on, was admissible. In Mississippi, where the bill of exchange sued on was drawn, the drawer is a competent witness in a suit between the holder and endorser of it, but in this state we have a statute which enacts, that "the drawer of a note or bill of exchange or other negotiable paper, shall never in any case whatsoever be admitted as a witness in any civil cause or suit brought by the holder of any such note, order, bill of exchange or other negotiable paper against any of the endorsers of said notes, orders, bills of exchange or other negotiable paper, for the recovery of the capital and legal interest of the said notes, orders, bills of exchange or other negotiable paper;" 1 Moreau's Dig., 624.

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The defendant's counsel contends that as the contract was made in Mississippi, it must be governed by the laws of that state, not only as to the form and matter of the contract, but also in relation to the evidence by which it is to be supported or invalidated. He therefore insists, that as Harper and Carpenter were competent witnesses in Mississippi they are so here. In the absence of any statutory provision, this might be a nice question, one upon which jurists are divided in opinion and the authorities nearly balanced.

Judge Story in his conflict of laws says, "generally speaking the validity of a contract is to be decided by the law of the place where it is made. If valid there it is by the general law of nations, *jure gentium*, held valid every where, by the tacit or implied consent of the parties." The same rule has been well established in our jurisprudence; Conflict of Laws, Ed. 1841, sec. 242; 11 Martin, 730; 12 Idem, 475; 8 Idem 95; 1 Martjn, N. S., 202; 1 Peters, 317; 13 Idem, 378, 379; and various other authorities cited by the learned author of the Conflict of Laws. But to this rule there is an exception as to the universal validity of contracts; which is, that "no nation is bound to recognize or enforce any contracts, which are inju-

Contracts are to be decided by the law of the place where made; but there is an exception, which is that no nation is bound to recognize or enforce contracts which are injurious to its interests or people.

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So, a statute of this state derogating from the established rules of evidence among nations, will be executed and obeyed as to contracts made in other states, when they are sought, be enforced here.

rious to its own interests or to those of its own subjects;" Conflict of Laws, sec. 244, p. 203; 2 Martin, N. S., 73; 5 Idem, 587; 13 Peters, 65, 78. The reason why the courts of one state or nation, will execute contracts according to the laws of another, rests upon a principle of comity and convenience among nations, which cannot be extended so far as to violate the positive legislation of the state or nation whose court is called on to enforce the foreign contract and law. We are bound to believe, that the legislature, when the statute in question was enacted, supposed that the rule of evidence which was then in force in this state as well as in Mississippi was injurious to the interests of our citizens, and therefore changed it. We cannot violate their will, although the necessity of the law may not be so apparent to our minds, as it was to those who had the power to enact it.

We therefore see no reason for changing the opinion heretofore given.

ZACHARIE & CO. vs. ROGERS & HARRISON.

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF NEW ORLEANS.

Where the owner of property places it in the hands of a third person, who makes advances on it by drawing a bill, the drawee and consignee cannot appropriate it to the payment of his debt against the owner, until the advance is paid.

Drawees, who are under no obligations to accept a draft, bind themselves to pay it, when they receive the goods or property on which it is drawn.

The acceptance of a draft, merely by the receipt of the bill of lading, and the property on which it is drawn, completes the obligation of the drawee to pay it.

This is an action to recover the balance of \$2095.99 due on an account made up from a bill of exchange drawn on a ship-

ment of sugar, which was dishonored by the defendants, by being protested for non-acceptance; although afterwards paid in part by them as drawees. The plaintiffs claim the balance with the expenses, interest and costs.

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The defendants pleaded the general issue.

The facts of the case are briefly these. In 1827-8, the plaintiffs and one J. B. Moussier made an arrangement, by which the former were to make some advances to the latter on his sugar crop. This was done by shipping the sugar to the defendants in Richmond, Virginia, and drawing a bill on them to be met by the proceeds. The bill was drawn at New Orleans on the 20th February, 1828, at 60 days sight, for \$11,000, and sold to the U. S. Bank, and forwarded to Richmond for acceptance. The day before the date of the bill of exchange, the plaintiffs took a bill of lading for 250 hogsheads of sugar, shipped by them, but "for account of J. B. Moussier," and consigned to the defendants, of which advice was given to the latter. The defendants, in their letter to plaintiffs, dated the 14th March, 1828, in reply, say, "we have been several days in receipt of your favor of the 8th ultimo, and now acknowledge the receipt of your letter of advice of draft upon us for \$11,000, which draft has been presented, and we are sorry to say, under the circumstances, we have been compelled to allow it to be noted for non-acceptance. Two mails have now arrived and no *invoice and bill of lading* have appeared. We fear you may think our course in this transaction has been rather too strict, but if you think dispassionately of the case, we think you cannot condemn us, as the bill of lading ought to have been forwarded as soon at least as the draft; and so many accidents have occurred in our correspondence with Mr. Moussier that we are afraid to put ourselves in the power of any uncertainty;"—"you will perhaps say that our respect for your signature ought to have induced us to accept and look to you for indemnity in case any accident; but the noting of a draft is not like a protest; and of which we have given a full explanation to the holder, at this office; assuring him that we

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are sure that unless some accident has occurred which you did not foresee ; *that the transaction is entirely regular, and that if, as we expect, we receive a bill of lading for the amount of property intended to be shipped us, we shall forthwith accept your draft, the refusal of which has given us great pain, but we trust will not be complained of by you.*"

On the next day, the 15th March, the defendants wrote again as follows : "Since we wrote you yesterday the 'Aspasia' has arrived at our wharf, and we have made a partial examination of the sugar, and though the quality appears fair and good, yet it does not justify Mr. Moussier's authorizing so heavy a draft on it, and will not, we are convinced, pay the *amount due us, and your draft also* ; under these circumstances we are compelled to allow the bill for \$11,000, to remain under note for protest, until we can ascertain whether we can, with safety accept it. We are sorry it had not been for 7 or 8000 ; under which circumstances we would with pleasure have accepted it. Fifty hogsheads are advertised for sale on Monday, and should the quality and price justify us in accepting your draft, which will make an advance of \$16,000, we shall certainly protect you ; and let what will happen, you may rely on our making the best of it, but our market is so completely glutted that we can hardly expect to get a price sufficient for it to cover your draft."

The defendants proceeded to sell the sugar and rendered an account of sales, which after deducting the amount of Mr. Moussier's account, previously owing to them, left a balance, after payment of charges, of \$9,100, which was applied to plaintiffs' draft. This still left a final balance due on the draft of \$1900, besides interest and expenses, which are the object of the present suit.

The parish judge was of opinion the defendants were not liable, and from judgment in their favor, the plaintiffs appealed.

Strawbridge, for the plaintiffs and appellants.

Grymes, for the defendants.

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Martin, J. delivered the opinion of the court.

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The plaintiffs allege that they advanced a large sum of money to one Moussier, for which they were to be re-imbursed out of a large parcel of sugars, to be shipped to and sold by the defendants; that they received the consignment of sugar and assumed to pay the plaintiffs' drafts thereon; but in violation of this engagement they only paid a part of said draft, leaving a balance of \$2,095,99, which they unjustly detained. The defendants pleaded the general issue. There was judgment for the defendants and the plaintiffs appealed.

The facts of the case appear to be these. On the 14th March, 1828, the defendants advised the plaintiffs that they had been compelled to note their draft for \$11,000, for protest; because neither the invoice of sugars or bill of lading had as yet been received; assuring them however that on the arrival of those documents the draft would be accepted.

The bill of lading and invoice of sugars themselves soon afterwards arrived, and were received by the defendants, who paid from their proceeds in part discharge of said draft the sum of \$9,100. The plaintiffs claim the balance with interest.

The counsel for the plaintiffs contends that the defendants' letter of the 14th March, 1828, contains a conditional acceptance, which became absolute on the arrival of the invoice and bill of lading; and if necessary still more so, on the arrival of the sugar, and the disposal of it by the defendants.

The defence of the appellees, which was sustained by the parish court, is, first, that the plaintiffs were merely the agents of J. B. Moussier, who was the owner, and for whose account the sugar was shipped.

2. That the defendants were under no obligation to accept the plaintiffs' draft for \$11,000.

3. That having paid all the funds they had in their hands belonging to Moussier, they were discharged; having correctly charged him with the balance which he owed them.

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Where the owner of property places it in the hands of a third person who makes advances on it by drawing a bill, the drawee and consignee cannot appropriate it to the payment of his debt against the owner, until the advance is paid.

Drawees, who are under no obligations to accept a draft, bind themselves to pay it, when they receive the goods or property on which it is drawn.

The acceptance of a draft, merely by the receipt of the bill of lading and the property on which it is drawn, completes the obligation of the drawee to pay it.

I. The parish court, in our opinion, erred. Moussier, the owner of the sugar, had placed it in the hands of the plaintiffs who were to be paid for their advances to him, out of its proceeds; and for that purpose consigned it to the defendants for sale. The draft in question was drawn on this sugar under the arrangement made with Moussier.

II. It is true the defendants were under no obligation to accept the plaintiffs' draft, until they bound themselves to do so, when they received the invoice of the sugars and bill of lading.

III. If the defendants had a claim against Moussier, to which they thought the proceeds of the sugar ought to be first applied, they should have informed the plaintiffs of it, and refrained from a promise to accept the draft. The acceptance of the draft by the receipt of the bill of lading and the invoice of the sugars, completed the obligation of the defendants to pay it. The plea of prescription cannot avail defendants, as this is not a suit on a bill of exchange.

It is therefore ordered, adjudged and decreed, that the judgment of the Parish Court be annulled, avoided and reversed; and proceeding to give such judgment as in our opinion ought to have been rendered in the court below: It is ordered, adjudged and decreed, that the plaintiffs do recover from the defendants, Rogers & Harrison, the sum of nineteen hundred dollars, with legal interest from judicial demand, with costs in both courts.

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ON A RE-HEARING.

ZACHARIE & CO.**vs.**
ROGERS
& HARRISON.

Where factors accept a mandate to receive produce and make insurance at the instance of the shippers they are bound to pay his draft drawn on it, instead of imputing it to the payment of debts due them by the former owner. They can only apply the surplus of the proceeds of the cargo to their own debts after payment of the bill drawn against it.

Grymes, for the defendants, applied for a re-hearing in this case, which was granted.

Strawbridge, on the part of the plaintiffs, urged that the decree should be so amended as to allow interest on the debt sued for, from the protest of the bill. He cited article 1929 of the Louisiana Code, which says, "interest is the damage due for delay in the performance of an obligation to pay money. The creditor is entitled to these damages without proving any loss; and whatever loss he may have suffered he can recover nothing more."

The case was argued by brief on the re-hearing by *Mr. Strawbridge*, for the plaintiffs, and by *Mr. Grymes*, for the defendants.

Morphy, J. delivered the opinion of the court.

This cause is before us on a re-hearing. A careful review of the facts and law of the case has not satisfied us of the incorrectness of our former opinion. The evidence shows that in February, 1828, the plaintiffs shipped to the consignment of defendants in Richmond, 250 hogsheads of sugar for the account and risk of J. B. Moussier, and advised them at the same time that they would value on the proceeds of the cargo to the amount of \$11,000. On the 14th of March following the defendants express their regret of the necessity they were under of suffering plaintiff's draft to be noted for non-acceptance, because since the receipt of the letter of advice two mails had arrived and neither the invoice nor bill of lading had made their

EASTERN DIS. appearance. They say, "we have given a full explanation to
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unless some accident has occurred which you did not foresee *the transaction is entirely regular* and that *if, as we expect, we receive a bill of lading for the amount of the property intended to be shipped us, we shall forthwith accept your draft*, the refusal of which has given us great pain, but we trust will not be complained of by you," The sugar having arrived that evening, the next day defendants write that "though the quality of the sugar appeared fair and good, yet it did not authorize so heavy a draft on it, and that it would not pay the amount due to them by J. B. Moussier and plaintiffs' draft also;" "and that under such circumstances they were compelled to allow the bill of \$11,000, to remain under note for protest," &c. It appears from the account of sales that the sugar brought a sum more than sufficient to pay the bill drawn against it, but defendants gave the holder of it only \$9100; having retained and applied the surplus of the proceeds to the discharge of their own claim against Moussier. This suit was brought to recover the balance which the plaintiffs had to pay on the return of the bill.

As to the advances made by plaintiffs to Moussier, and to secure which the sugar was placed by the latter in their hands to be consigned to defendants, the record furnishes positive evidence. We find in it copies of three receipts of Moussier, one for \$200, one for \$1700, and one for \$8444, stating that these sums were paid by plaintiffs to him as advances on this sugar in the course of February, 1828.

On the part of defendants it is urged that the letter of the 14th of March, 1828, contains no positive and unconditional promise to pay the bill; that the plaintiffs did not draw the bill on the faith of any such promise; that a promise to accept between the drawer and drawee is not absolutely binding between those parties unless based upon an absolute indebtedness; and finally that plaintiffs in drawing this bill as well as in shipping the cargo acted merely as the agents of Moussier.

The transaction which gives rise to this controversy appears to us simple and of daily occurrence between planters and merchants. A factor residing in Natchez receives a planter's crop, advances him money upon it, ships it to New Orleans "for account and risk of" the planter, and advises the factor here that he has drawn a bill of exchange on the proceeds. The New Orleans factor promises to accept; can he afterwards instead of paying the bill drawn against the cotton, apply its proceeds to the payment of an old balance due to himself by the planter? Surely not. It is clear from the language used by defendants in their letter of the 14th of March that they understood perfectly, as every merchant must have done, that the condition under which the cargo was consigned to them was that out of its proceeds the bill drawn against it by the shippers was to be paid. They could mean nothing else when they say "the transaction is entirely regular and if, as we expect, we receive a bill of lading for the amount of the property intended to be shipped us, we shall forthwith accept your draft." If there could have been any doubt on the subject, it is removed by a letter of the 24th of January preceding, in which Moussier tells defendants, "I gave order this day to my friend, Mr. Zacharie, an eminent merchant of this place, to ship to your address for my account about 200 hogsheads of sugar, he will draw on you for my account \$7000 or thereabouts; *the surplus of the sale of the cargo shall be to pay off the balance I owe you.*" A letter of the plaintiffs of the same date opens their correspondence with defendants. After advising defendants of the intended shipment, they request them to cover it by insurance, valuing each hogshead at sixty dollars, and defendants on the 16th of February answer that the insurance is effected as directed. By complying with this order to insure and receiving the cargo announced to them by Moussier and plaintiffs, they accepted the mandate, were bound to execute it in all its parts, and could apply to their own claim against Moussier only the surplus of the proceeds of this cargo, after the payment of the bill drawn against it; La. Code, arts.

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Where factors accept a mandate to receive produce and make insurance at the instance of the shippers, they are bound to pay his drafts drawn on it, instead of imputing it to the payment of debts due them by the former owner. They can only apply the surplus of the proceeds of the cargo to their own debts, after payment of the bill drawn against it.

EASTERN DIS. 1810, 2958; 12 Pickering, 297; 12 Johnson, 276. The draft
July, 1841. was for a larger amount than was announced by Moussier or
ZACHARIE & CO. plaintiffs in their first letters, but of this change the defendants
vs. were advised before they received the sugar. They were
ROGERS informed that the sugar first spoken of having been found upon
& HARRISON. examination to be of an inferior quality, a second cargo of bet-
 ter quality and fifty more hogsheads had been substituted and
 that the draft would in consequence be increased to \$11,000.
 This increase of the amount of property shipped and of the
 sum drawn upon it did not vary the object and conditions of
 the shipment as explained to defendants by Moussier. The
 defendants, to be sure, might have refused acceptance of this
 draft, modified as their engagement had been, but then they
 must have refused the whole control. They could not receive
 the cargo and refuse the bill; but with a full knowledge of the
 change they announce that they will accept plaintiffs' draft as
 soon as the bill of lading reaches them, without informing the
 latter that they had any claim against Moussier which they
 intended to satisfy out of the proceeds of the cargo in pre-
 ference to the bill drawn against it. The cargo arrives and
 then in violation of their promise, they appropriate its proceeds
 to their own claim against Moussier, on the pretext that the
 plaintiffs were acting only as his agents. This promise of de-
 fendants was not one of those naked engagements which parties
 are free to revoke or disregard according to circumstances; it
 was based on a valid consideration, to wit: the receiving of
 the bill of lading; and they could not violate it without indem-
 nifying the plaintiffs. Even without any positive promise on
 their part, we think that under the circumstances of the case
 and the ordinary and well known course and understanding of
 commercial dealings of this kind, the defendants would have
 been bound to apply the proceeds of this shipment to the pay-
 ment of plaintiffs' draft in preference to any claim they had
 against Moussier.

It is therefore ordered and decreed that the former judgment
 of this court remain undisturbed.

**ROBERTSON ET AL. vs. WESTERN MARINE AND FIRE
INSURANCE COMPANY.**

**EASTERN DIS.
July, 1841.**

APPEAL FROM THE COMMERCIAL COURT OF NEW ORLEANS.

**ROBERTSON
ET AL.
vs.
WESTERN
MARINE & FIRE
INSURANCE CO.**

The master of a boat, whose cargo is materially damaged by one of the perils insured against, is not bound to wait a great length of time, at a heavy expense, to overhaul, repack and reship the cargo, when but little or nothing would be saved. He may exercise a sound discretion, and sell it in its damaged state, for the best price and benefit of all concerned.

The purchase of property, damaged by the perils insured against, by the owner, who has been insured, is illegal, and has the effect of revoking his abandonment, and turning the total into a partial loss, which is all that can be recovered.

After abandonment, the insured becomes the agent of the insurers, and standing in that relation, he cannot purchase, except with the consent of his principals. The master and owner both become agents of the underwriters, on abandonment.

Custom or usage in the country, of owners buying in their property, when sold as damaged, for account of the underwriters, cannot justify *that*, which by the law of insurance, has been held to be unlawful.

This is an action on a policy of insurance, to recover \$3720, as the value of 62 hogsheads of tobacco, at \$60 per hogshead, 56 of which the plaintiffs allege, they shipped at Greensburg, on Green River, in Kentucky, in the flatboat called the Lady Marshall, whereof James Saunders was master; the boat and cargo being consigned to Lambeth & Thompson, commission merchants in New Orleans. That said boat struck a rock in the river, by which it sunk, and the cargo was seriously damaged; that every possible care was taken of it, for the benefit of the underwriters, and to whom it was abandoned as a total loss. The other four hogsheads were in another boat, which shared a like fate with the above. The plaintiffs pray judgment for the entire amount, as for a total loss.

The defendants pleaded the general issue; they aver, that all the proceedings had in regard to the tobacco, are illegal; that the sale is a pretended and fraudulent one, and the plaintiffs have no cause of action.

Upon these issues the cause was tried; and with the evidence taken and offered on the trial, it was submitted to a jury.

EASTERN DIS. who returned a verdict for the plaintiffs in the sum of \$2800.
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INSURANCE CO.

From judgment confirming the verdict, the defendants appealed.

Jones & Peyton, for the plaintiffs and appellees.

Maybin & Grymes, for the appellants.

Morphy, J. delivered the opinion of the court.

This action is brought on an open policy of insurance, taken by Lambeth & Thompson, commission merchants of New Orleans, for whom it may concern. The plaintiffs seek to recover \$3720, the value of fifty-eight hogsheads of tobacco, at the rate of \$60 per hogshead. They allege, that on or about the 9th of January, 1838, they shipped this tobacco on board the flat-boat *Lady Marshall*, whereof James Saunders was master, from Greensburg, on Green River, in the State of Kentucky, to the address of the said Lambeth & Thompson, of this city; that while said boat was descending Green River, on her way to the place of destination, and about one hundred and fifty miles below Greensburg, she was wrecked and sunk in consequence of running on a rock, notwithstanding the exertions of the master and crew to avoid the accident: that a total loss of said tobacco has thus occurred by one of the perils insured against, to wit: the dangers of the river; and that they have made an abandonment to the company of such part of the tobacco as could be saved from the wreck. The underwriters rest their defence on two grounds, to wit: 1. That the sale of the damaged tobacco made by the master, was unnecessary and illegal. 2. That the abandonment in this case was waived, because the tobacco was purchased by the plaintiffs.

1. On the first ground of defence, it has not been, nor could it be denied, that in cases of necessity the master, upon whom the character of agent is in some manner forced, is authorized to sell for the benefit of all concerned; but it is contended, that the circumstances of this case did not justify a sale, that the tobacco could have been dried, repacked and forwarded to New

Orleans by the master, as it has been subsequently by the purchasers. The evidence shows, that notwithstanding the exertions of the crew, and what additional hands could be procured, the tobacco remained several days under water; that some of the heads of the hogsheads were bursted out, and the tobacco saturated with water. The witnesses and appraisers agree, that the damage done to it exceeded fifty per cent. If another boat could have been procured on the spot, (of which there is no evidence,) it would have been contrary to the interest of the insurers, to reship the tobacco in its then damaged condition; for it would have become rotten and entirely worthless long before it reached New Orleans. But admitting, as defendants contend, that it could be considered the duty of the master to go through the tedious, expensive and uncertain process of opening, drying and reprizing the damaged tobacco, we are satisfied from the testimony, that it was impracticable for him to do it. There was on board upwards of eighty hogsheads of tobacco, and the master was bound to take care of the whole of it; numerous barns or shelters were necessary for the operation, and none were to be had on the bank of the river, nor could a sufficient number of hands be procured. Two months at least would have been required to prepare the tobacco for reshipment, and then from the uncertainty of the navigation of Green River, the cargo might have been detained several other months, waiting for a tide. The master declares, that he thought it more advisable to sell the tobacco, damaged as it was, because the expense would have been much more, to have fitted up and repaired the boat, and dried and repacked the tobacco, than it would have sold for in New Orleans. Two witnesses who express the opinion, that the tobacco could have been dried and reprized, admit, that the process would have been very expensive. It further appears, that the purchasers of the tobacco had to send it a distance of ten miles, and to procure a person of skill and experience, to attend to the drying and reprizing of it; that it required a number of barns and shelters, and a great number of hands, and that it was nearly

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The master of a boat whose cargo is materially damaged by one of the perils insured against, is not bound to wait a great length of time, at a heavy expense, to over-haul, repack and reship the cargo when but little or nothing would be saved. He may exercise a sound discretion, and sell it in its damaged state, for the best price and benefit of all concerned.

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three months, before the tobacco was ready for reshipment. Under such circumstances, it appears to us, that the master was not bound to impose on himself and his crew these new and troublesome duties, and was justified in selling the damaged cargo. Then being no longer near the place, the master consulted with one Barret, the clerk of the county court of the county, where the accident happened. Notices of the sale were stuck up in different public places during several days in three or four of the adjoining counties, and every thing appears to have been conducted with good faith and fairness on the part of the master. 2 Philips, 311, 328; 1 Douglass, 234; 12 Johnson, 107; 2 Sumner, 215.

II. On the second point, we are of opinion, that the purchase of property, damaged by the perils insured against, by the owner, who has been insured, is illegal, and has the effect of revoking his abandonment, and turning the total into a partial loss, which is all that can be recovered.

After abandonment the insured becomes the agent of the insurers, and standing in that relation, he cannot purchase, except with the consent of his principals. The master and owner both become agents of the underwriters on abandonment.

chase by the insured was illegal, and had the effect of revoking their abandonment; it turned the total into a partial loss. It is now well settled, that when the insured abandons and claims as for a total loss, if it becomes necessary to sell the subject of the insurance, he cannot purchase it on his own account, without waiving the abandonment. This rule is said to be founded in sound policy, to prevent fraudulent speculations upon a loss, at the expense of the insurer. It rests also on the broad and well known principle, that a trustee cannot become the purchaser of the estate of his *cestui que trust*.

After an abandonment, the insured becomes the agent of the insurers, and standing in that relation, he cannot purchase, except with the consent of his principals. If he does, and the purchase is not sanctioned by the insurers, the abandonment is waived and annulled. It has been remarked, that this doctrine applies with great force and reason to cases of insurance. By-standers will seldom bid at sales of property in that situation, where they see the original owner is himself bidding with a view, as they may suppose, to save something from the wreck. The underwriters being in most cases at a distance from the spot, where the loss happened, would be exposed to great impositions, if the rule were relaxed. 2 Caines, 280; 9 Pickering, 466; 3 Johnson 39; 5 Idem, 310; 10 Idem,

177; 12 Idem, 24; 1 Mason, 341; 2 Mason, 369; Philips, *EASTERN DIS-*
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 409, 410.

But it is urged, that these authorities do not apply to the present case, in which all the proceedings in relation to the sale were conducted from beginning to end by the master as sole agent of the underwriters; that by the abandonment the property was transferred to the insurers, and that from that moment the master ceased to be the agent of plaintiffs, and became theirs; from whence it is argued, that the insured are to be considered as strangers; having nothing to do with the sale, and competent to purchase like any other person. It is undoubtedly true, that the master or whoever has the charge of the property, becomes instantly upon abandonment the agent of the insurers; but this must be understood in cases, where the owners are not themselves on the spot; for if they are, they become the agents of the underwriters as well as the master, and the latter will naturally consult with them, and be guided by their advice and directions; especially when, as in the present case, a regular abandonment has not yet been made. A few days before the sale, the master, it is true, entered his protest, in which he declared, that the sale or reshipment of the tobacco would be made for the underwriters; but the notice of the loss and of the intention to abandon was given to the defendants only after the sale. Besides, the insured agrees by the policy, that if he takes any step in regard to the property, after an abandonment, he will act as the agent of the insurers as well as his agents, captain, supercargo, &c. 2 Condry's Marshall, 614. In most of the cases, in which a purchase by the owners has been held to be a waiver of the abandonment, it will be found, that the sale was made under the authority of the master. The record contains some evidence tending to show, that it is the prevailing usage in that section of the country, for the owners of damaged tobacco to buy it in at the sales made for the account of the underwriters. This usage, admitting it to exist, cannot surely justify, in a legal point of view at least, that which by the settled law of insurance has been

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Custom or usage in the country, of owners buying in their property, when sold as damaged, for account of the underwriters, cannot justify that, which by the law of insurance has been held to be unlawful.

EASTERN DIS. held to be unlawful. It is not besides, proved, to have been of
July, 1841. such long standing and general notoriety, as to authorize the
GOURJON, f. m. c. presumption, that the parties have contracted with reference to
vs. it: The plaintiffs can, in our opinion, recover only for the
HOLMES ET AL. partial damage sustained, which is proved to have been fifty
 per cent., and the expenses for saving the tobacco, which
 amounted to \$170.

It is therefore ordered and decreed, that the judgment of the
 Commercial Court be avoided and reversed, and proceeding to
 give such judgment as, in our opinion, should have been ren-
 dered below: It is ordered and decreed, that the plaintiffs do
 recover of the defendants nineteen hundred and ten dollars,
 with costs below, those of this appeal to be borne by the plain-
 tiffs and appellees.



GOURJON, f. m. c., vs. HOLMES ET AL.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

In the sale of property subject to an annual tax, the purchaser takes it subject
 to all the tax *accruing* after the sale; the vendor being liable for all due up
 to the time of sale.

This case arises on an opposition and injunction obtained by
 the defendants, against an order of seizure and sale sued out
 by the plaintiff for the balance due on certain lots, and on
 which a mortgage was retained to secure payment of the price.
 The defence is that there was a large sum due on the lots for
 paving streets and side walks, which they had to pay but for
 which the plaintiff was bound.

There was judgment sustaining the opposition, perpetuating

the injunction for \$27 55; but dissolving it and directing the seizure to go on for the balance of the debt due. The defendants appealed.

EASTERN DIS.
July, 1841.
CORRECTION, L.M.A.
TH.
WALKER ET AL.

J. Seghers, for the plaintiff and appellee.

L. Peirce, contra.

Siman, J. delivered the opinion of the court.

An order of seizure and sale of a certain lot of ground described in the plaintiff's petition, having been granted and issued for the purpose of satisfying a sum of three thousand dollars, balance due on the price of the sale of the said property; the defendants made opposition to the execution of the writ, on the ground that said plaintiff was indebted to them in the sum of four hundred and eight dollars and eighty-eight cents, being the amount of a bill for paving and making a side walk by the corporation before the sale took place, and paid by them since the purchase.

A short time after the filing of the opposition, the plaintiff took a rule on the defendants to show cause why the injunction obtained should not be dissolved, on the grounds that the costs of paving streets and making *banquettes* are to be paid by the proceeds of an annual tax for twenty years, imposed for that purpose by the city council; and that therefore the plaintiff is not chargeable with the taxes accruing after the alienation of the lot.

The judge *a quo* rendered judgment maintaining the injunction for twenty-seven dollars and fifty-five cents, and dissolving it for the balance of the amount claimed, from which judgment the defendants appealed.

It does not appear to us that any error has been committed. By an ordinance of the city council, dated 27th of September, 1827, an annual tax for twenty years is to be imposed on all the owners of lots, for the purpose of paving the streets

EASTERN DIS. and making banquettes, or reimbursing the costs of such works
July, 1841. already done and completed ; with the faculty, however, al-
SOULJON, f.m.c. lowed to the owners, of exempting their property from taxation
vs.
HOLMES ET AL. by an anticipated payment or reimbursement of said expenses ;
City laws and regulations, 278.

In this case the defendants thought proper to exercise the faculty, and to pay the taxes in anticipation ; but as the property was not chargeable at the time of the sale, with the taxes which might accrue thereon afterwards, it is clear that the vendor could not be made responsible for any other tax on the lot, but such as had accrued previous to the alienation. In the case of Arnaud's heirs vs. his executor, which presented a similar question, this court held that "the alienation of taxable property discharges the owner from all taxes on it thereafter accruing or becoming due ;" 3 *La. Rep.*, 336 ; 1 *Idem*, 15. We have no reason to be dissatisfied with this part of our jurisprudence, and as at the time of the sale to the defendants, the plaintiff owed one year and three months of the tax, the amount whereof has been allowed by the lower court, we are unable to say that the judgment appealed from should in any manner be disturbed.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs.

MUNICIPALITY No. ONE vs. CORDEVIOLE & LACROIX. EASTERN Dis.
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APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

MUNICIPALITY
NO. ONE
vs.
CORDEVIOLE &
LACROIX.
19 235
113 385
113 699,

The adjudication is the completion of a sale, so as to invest the purchaser *as owner*, and the right to possess the thing sold.

So, the adjudication entitles the vendor not only to damages for non-compliance but to an action for the price.

The sale is perfect between the parties and the property is acquired to the purchaser on an agreement between them, as to the object sold, and the price, even without delivery.

The purchaser may retain the price, when he is in danger of eviction from a previous claim on the property, except where he has been informed of it before the sale. A claim resulting from an act of the legislature, comes within the exception, as ignorance of it cannot be pleaded.

A claim of the draining company on land, for its improvement, is not adverse or a disturbance of possession.

Purchasers cannot complain of the failure of the vendor to pass an act of sale, when it was caused by their own acts, in directing the notary not to give up their notes.

This is an action to compel compliance with a sale and adjudication of certain lots of ground, which the Municipality No. One, caused to be sold at public auction in March, 1837, and the defendants were the highest and last bidders. The plaintiffs claim the sum of \$6,450 as due, and that the defendants be required to accept the act of sale tendered to them and give up their notes according to the terms thereof.

The defendants set up several matters in defence, and particularly rely on the claim of the New Orleans Draining Company, on said lots for draining improvements made thereon; and aver that they are in danger of eviction. That they have not received any deed or title to said property, and that no sale has in fact taken place: But if the sale was ever valid it should be rescinded, or the price reduced in consequence of the diminished value of the property by the claim of the Draining Company. They pray that the suit be dismissed.

The cause was submitted to a jury on these issues, and the

EASTERN DIST. evidence adduced. There was a verdict and judgment for the
July, 1841. plaintiffs and the defendants appealed.

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NO. ONE
VS.
CORDEVILLE &
LAURENCE.

Roselius & Upton, for the plaintiffs and appellees.

Grymes & Bodin, for the defendants and appellants.

Martin, J. delivered the opinion of the court.

The defendants are appellants from a judgment, by which the plaintiffs recovered the price of certain lots adjudicated to the defendants, and for which the plaintiffs hold their notes.

It is not denied that the adjudication took place: It is admitted that the defendants left their notes with the notary, but it is averred that no deed of sale was executed or signed by either of the parties. Payment is resisted on the ground that the lots were and are in possession of the Draining Company, which has a mortgage thereon for the value of their improvement of the ground, and that neither this possession or mortgage was made known at the time of sale. There was a verdict and judgment against the defendants, and they made an unsuccessful effort to obtain a new trial.

Our attention is first drawn to a bill of exception taken to the refusal of the judge to give the following instructions to the jury.

1. That an adjudication by an auctioneer is not a completion of the contract of sale so far as to give possession of the property sold, to the vendee.

2. The only effect of the adjudication at public sale is to put the property adjudicated at the risk of the vendee; and may perhaps, besides, have the effect of a promise to sell and an agreement to purchase.

3. That the default to pass the act of sale after the adjudication at auction, only entitles the vendor to damages; amounting perhaps to the price of the sale.

4. That a sale is not complete, except by the possession being given to the vendee, of the object sold.

5. That if the contract of sale contains a clause of warranty, and the jury think the claim of the Draining Company arose anterior to the sale, the plaintiffs, as vendors, in case of eviction, are obliged to return the price if paid; or cannot claim the price if none has yet been paid.

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LACROIX.

6. That if the jury believe the Draining Company have had control and possession of the property up to this date, and that the plaintiffs have not been able to give possession to the defendants, the law authorizes a rescission of the sale; the purchaser being entitled to the enjoyment of the thing sold.

7. That if the defendants are sued upon the adjudication, the condition thereof being that an act of sale *shall be passed*, then it was incumbent on the plaintiffs to show the refusal of the defendants to sign.

I. The Louisiana Code, 2586, expressly declares that the "adjudication is the completion of the sale; and the purchaser becomes the owner of the object adjudged." It would seem the right of possession would also follow, as a consequence of ownership.

The adjudication is the completion of a sale, so as to invest the purchaser as owner, and the right to possess the thing sold.

II. After the above declaration contained in the Code, it was idle to require the judge to instruct the jury, "that the only effect of the adjudication was to place the thing adjudged at the risk of the vendee," or was only like "a promise to sell and an agreement to purchase."

III. If the adjudication was a completion of the sale, it entitled the vendor to something more than damages, to wit: an action for the price.

So, the adjudication entitles the vendor not only to damages for non-compliance, but to an action for the price.

IV. The Louisiana Code, 2431, declares that the sale is considered to be perfect between the parties, and the property acquired to the purchaser, on an agreement of the parties on the object and price, although the object be not delivered, nor the price paid.

The sale is perfect between the parties and the property is acquired to the purchaser on an agreement between them, as to the object sold, and the price, even without delivery.

V. If any one has a claim on the thing sold, whereby the purchaser is in danger of eviction, he may retain the price; but there is an exception to this rule when he has been informed

The purchaser may retain the price, when

EASTERN DIST. ed before the sale of this danger; La. Code, article 2535, July, 1841. latter clause.

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NO. ONE
VS.
CORDEVIOLLE &
LACROIX.

The court was certainly correct in refusing to give any of the first four instructions required.

The fifth instruction might have been given. It ought however to have been accompanied with the modification of the article 2535 of the Code above cited; which would have rendered it irrelevant. The defendants were within the exception which modifies the general rule; as the possession and mortgage of the Draining Company results from an act of the legislature, the ignorance of which cannot be pleaded.

he is in danger of eviction from a previous claim on the property, except where he has been informed of it before the sale. A claim resulting from an act of the legislature, comes within the exception, as ignorance of it cannot be pleaded.

VI. The sixth instruction, refused by the judge, was in our opinion irrelevant. The control and possession of the Draining Company resulted from their act of incorporation which shows that it was exactly the same right that in 1805 was given

A claim of the Draining Company on land, for its improvement, is no adverse or disturbance of possession.

to the Orleans Navigation Company, which was the mere right of improving the land by drains, levees, canals, &c., without conferring on the company any possession adverse to, or exclusive of, that of the owners of the land to be improved.

VII. We have already seen that the adjudication is a completion of the sale. The testimony shows that the defendants prevented the execution of the act of sale by directing the notary not to give up the notes to the Mayor when he presented himself to sign the act; in consequence of which the notary would not allow the Mayor to sign.

On the merits it appears that the defendants after they had deposited their notes with the notary, declined the completion of the act of sale, and forbid the notary from parting with said notes, under the pretence that they were in danger of an eviction from the premises; and that the plaintiffs presented themselves before the notary to complete the act of sale and receive the defendants notes. On these facts it is clear that the defendants cannot complain that the deed of sale was not executed by the plaintiffs, since their own conduct alone prevented its execution.

Purchasers cannot complain of the failure of the vendors to pass an act of sale, when it was caused by their own acts, in directing the notary not to give up their notes.

Nothing in the evidence shows that the alleged apprehension

of eviction was any thing but chimerical. The operations of the Draining Company, authorized by the act of the legislature, were known by the defendants and the public; and most probably the expectation of the advantages which these operations seemed to promise were the inducements which led the plaintiffs to improve the favorable moment to sell and the defendants and others to bid. It appears that the jury viewed the matter in this light. The inferior court has expressed its satisfaction with the verdict, and we see no ground on which to disapprove it, or disturb the judgment.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs.

EASTERN DIS.
July, 1841.
GUINAULT
vs.
LE CARPENTIER.

GUINAULT vs. LE CARPENTIER.

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF NEW ORLEANS.

It is entirely a discretionary power, in the inferior court, to order a case to be sent before auditors, to facilitate the trial of causes, by the investigation of accounts.

Where the verdict of a jury appears manifestly erroneous, the case will be remanded for a new trial.

This is an action to recover a balance, which the plaintiff alleges is due him by the defendant, as a clerk and crier in his auction establishment, amounting to \$8520.83. The plaintiff sets out the time of his employment as clerk and crier, from the 15th September, 1830, to the 15th November, 1836, and that his salary was understood to be gradually increasing from

EASTERN DIS. about \$700 per annum, until it was fixed in 1833 to \$2500 per July, 1841.

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balance as stated.

The defendant pleaded the general issue, except as to certain allegations admitted. He set up a detailed account in the defence, which shows a balance against the plaintiff of \$4396, for which he prays judgment over in reconvention.

The case involves minute and intricate accounts and the record contains a mass of testimony. There was a mistrial; and on submitting the cause to a jury the second time, they returned a verdict for the plaintiff in the sum of \$2746.49, which after an unsuccessful attempt to obtain a new trial, was confirmed by the judgment of the court; and the defendant appealed.

C. Janin & Roselius, for the plaintiff and appellee.

Benjamin, for the appellant.

Garland, J. delivered the opinion of the court.

The petitioner alleges he was for about six years in the employment of the defendant, who is an auctioneer, as his crier and out-door clerk. He went into the service of defendant about the 15th of September, 1830, and continued until the 30th of June following, at the rate of fifty dollars per month, when he was paid up in full. He alleges that about the end of the month of July, 1831, he was appointed a clerk in the Bank of Louisiana, at a salary of \$900 per annum, but upon the offer of the defendant to give him the same salary and a fair increase at the time business is generally resumed, that is on the 1st of November, following, he resigned the office and remained in defendant's employment. That about the 1st of May, 1832, the 1st of November in the same year, the 1st of July, 1833, and the 1st of December following, the defendant entrusted him with further care and business in his auction store, and said to him at each of those periods, his salary was augmented, but did not say how much. The petitioner says, that at first, from motives of delicacy, he forebore inquiring

how much he was to have, or asking any explanation, but after a long time had elapsed, he several times requested defendant to have a settlement with him, which he always deferred for want of leisure and the pressure of other business. He further alleges that about the month of October, 1836, being persuaded that the defendant was not acting in good faith, he determined to quit his employment, gave him notice to that effect, and left him on the 15th of the following month; soon after which time, the plaintiff in person, and through friends, again called on defendant for a settlement, which was postponed on various pretexts. The plaintiff says he is entitled to \$11,520,83, in consequence of the promises to him made and by reason of the further and more important business entrusted to him. He admits the receipt of about \$3000, and claims judgment for the remainder.

The plaintiff states his claim as follows:

Salary from 1st August, 1831, to 31st October, same year, at \$900 per annum, 3 months,.....	\$225,00
From November 1st, 1831, to 30th April, 1832, at \$1500 per annum, 6 months,.....	750,00
From the 1st of May, 1832, to 31st October, 1832, at \$1800 per annum, 6 months,.....	900,00
From the 1st November, 1832, to the 30th June, 1833, 8 months, at \$2000 per annum,.....	1133,33
From 1st July, 1833, to 30th November, 1833, 5 months, at \$2200 per annum,.....	916,67
From the 1st December, 1833, to the 15th November, 1836, at \$2500 per annum,.....	7395,83

\$11,520,83

The defendant for answer, says, that about the 15th September, 1830, he employed the plaintiff, who then knew very little of business, at a salary of \$40 per month. That as he became better acquainted with business and more useful, he gradually increased the compensation, at the periods mentioned and the sums stated in an account he annexes, until the 1st of

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July, 1833, when the salary was fixed at \$1200, after which time it was never increased, as the plaintiff well knew, and he had received that sum, as will appear from entries made in defendant's books by the plaintiff. He further says, that the claim presented by plaintiff has been prepared and devised for the purpose of balancing certain sums received and collected by him as clerk, and not accounted for. He states the plaintiff was his out-door clerk, and was in the habit of making sales in different parts of the city, and collecting the money, also the bills for sales made at the store. He then presents an account, which leaves a balance due defendant of \$4996, for which he claims a judgment in reconvention.

The cause was twice tried by a jury; the first could not agree, but the second found a verdict in favor of the plaintiff for \$2746,59; upon which judgment was rendered, and the defendant appealed.

After the first trial, the defendant moved for a rule on the plaintiff, to show cause why auditors should not be appointed to examine and state the accounts and report thereon for the information of the court and jury. Upon argument, the rule was discharged, and the defendant's counsel has called our attention to it, with a view as he states, of having our judgment upon the question, in the event of the cause being remanded.

The article 443 of the Code of Practice authorizes courts to appoint auditors to examine intricate accounts whenever they may deem them necessary. This confers a discretionary power,

It is entirely a discretionary power in the inferior court, to order a case to be sent before auditors, to facilitate the trial of causes, by the investigation of accounts.

which we are not disposed to interfere with, unless in a case of abuse, which is not shown in the present instance. The law was intended to facilitate the trial of causes and the investigation of accounts, but if the judge chooses to do that himself or impose it on a jury, we do not think it a sufficient reason to interfere, although we might think the appointment of auditors or experts, would be a more convenient mode of arriving at the real facts. This question was argued at much length in the case of *Caulker vs. Banks*, 3 Martin N. S. 532, and we think

correctly decided. The plaintiff could not perhaps have consented to the appointment of auditors, as he had prayed for a jury, without waiving it, but we are not prepared to say, he could limit the authority of the court by asking a trial by jury. *1 Idem, 154.*

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July, 1841.*

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A number of witnesses have been examined and the record is encumbered with many statements having no bearing upon the case. There is no evidence showing any particular contract between the parties after 1831. Within the first year several receipts were given, which show how much plaintiff was to receive, and one dated August 8th, 1831, shows the salary was then at the rate of \$700 per annum, which is about the time plaintiff says he was appointed a clerk in the Bank of Louisiana. The increase from six to seven hundred dollars took place on the 1st of July, 1831, as is shown by the receipt last mentioned. The plaintiff alleges that as there is no question about his having been in the employment of defendant, and as the contract only extended to services and not to price, he is entitled to recover what his services were worth, and relies upon the testimony to sustain his claim, and the verdict of the jury.

Both parties agree, that in July, 1831, the salary was \$700 per annum, the plaintiff says, on the 1st of August it was increased to \$900, the defendant says it was not so increased until November. This increase, it is said, was in consequence of the appointment plaintiff had received in bank, the date of which is not fixed, nor is the fact of the appointment established. The only witness who speaks of it, says, he had recommended plaintiff for the office, and had the promise of the cashier he should be appointed, which he considered as an appointment, but on the day of the election, plaintiff withdrew his application, saying, defendant would give him as large a salary as the bank offered, to wit, \$900. The records of the bank will probably show when the appointment of runner was made in that year, but as the evidence now stands, the date is uncertain. The witness does not name any month in the year

EASTERN DIS. when it was made, whereby the plaintiff leaves his case
July, 1841. doubtful.

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The evidence to show the value of the services is very uncertain. Valsin Blache, who was a fellow clerk, and principal book-keeper, seems never to have known of this rapid increase of salary. He received nothing like it himself. The successor of plaintiff received but one thousand dollars per annum. In 1833, when defendant and J. B. Blache settled their partnership account, the wages of all the clerks were included and Valsin Blache says plaintiff's salary was then one thousand dollars per annum. This settlement was made in presence of plaintiff who made no objection, yet in the account on file, he says, he was entitled at that time to a salary of \$2200. At that time neither J. B. Blache or defendant seemed to have any idea of paying any such salary. It is not shown that the clerk of any auctioneer in the city receives the compensation claimed by plaintiff, or ever did J. B. Blache, who swears to the correctness of the account, states he was formerly a partner of defendant and he received only \$2400 per annum as his share of the profits. He further says he is an auctioneer and only gives his crier and out-door clerk \$1500 to perform the same services plaintiff performed, and he expects him to be at his command night and day, if necessary, whilst it is shown plaintiff often left the store of defendant at four and a half or five o'clock in the evening, and often came so late in the morning as to excite the complaints of his employer.

Fernandez & Whiting, who testify strongly in favor of plaintiff, were not themselves willing to give him \$2500 per annum, after he left the defendant, although they think he ought to pay that price. They say they wished to employ him, first offered \$1500, then \$1800, and finally made up their minds to give \$2000, but seem never to have offered it. Whiting says that when he offered plaintiff \$1500 as a salary he refused, saying he had as much at defendant's.

Various other witnesses were examined to prove the value of the services, who swear they believe they were worth the sum

charged, some of them are auctioneers and have been clerks to auctioneers, but not one give an instance of any other auctioneer's clerk receiving such compensation.

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GUINAVLT
VS.

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The defendant has shown by several witnesses what he gives his other clerks, it is proved that on more than one occasion the plaintiff acknowledged his salary was \$1200 per annum, and though the plaintiff's counsel has in his argument attacked the credibility of the witnesses who prove these admissions, it does not appear he attempted it in the court below but in one instance, and then with but little success. It is true a witness named Bernard Baudes swears he was present and heard none of the admissions and statements sworn to by Roy, Laurain and Deran, but he evidently felt a strong partiality for the interests of the plaintiff, and testified under its influence.

Several of the witnesses for plaintiff, who testify most strongly, are contradicted in direct terms by witnesses for the defendant. In the testimony of Domingon & Massy, that of Whiting & Levy, and of Valsin and J. B. Blache, there are palpable discrepancies and contradictions. Beaudue, who appears to appreciate plaintiff's services very highly whilst in the employment of defendant, only gave him forty dollars per month whilst in his own service, and gives as a reason that his business would not justify him in giving more. He does not say defendant's business would justify him in giving the amount claimed.

In the evidence of J. B. Blache, it is stated, that when he was about commencing business as an auctioneer, he offered to take the plaintiff into partnership with him, which he declined. The witness further states his business has been very profitable and if plaintiff had accepted the proposition, he would have made more than he now claims of defendant; it seems therefore to have been inferred, he ought to recover of defendant a compensation for what he has lost by declining the association. Upon this, we have to remark, there is no evidence that defendant did any thing to prevent plaintiff from entering into this partnership, nor is it shown such large profits were anticipated, if they had been, it may well be doubted whether Blache would have made the offer he did.

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vs.
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CREDITORS.

A full examination of the testimony has satisfied us the plaintiff was an active and useful clerk, and his services ought to be compensated by a fair salary, but we are also satisfied that more than a just and liberal compensation has been allowed by the jury. An inspection of the plaintiff's letter to defendant informing him of his intention to quit his service, satisfies us that at that time neither party understood, the salary was at the rate of \$2500 per annum, or that the services of plaintiff were worth that sum.

Where the verdict of a jury appears manifestly erroneous, the case will be remanded for a new trial.

Believing the verdict to be clearly erroneous, we are compelled to remand the case for a new trial.

The judgment of the Parish Court is therefore annulled and reversed, and this cause remanded to be proceeded in according to law—the plaintiff and appellee paying the costs of this appeal.



GIRARD ET AL., vs. THEIR CREDITORS.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

The oath of an opposing creditor is not necessary to his opposition made to the appointment of a syndic.

This case comes up from a judgment which dismisses the opposition of Thomas & Le Carpentier to the appointment of a syndic by the creditors of the insolvents, because it was not sworn to or supported by the oath of the opponents. The opposing creditors appealed and pray a reversal of the judgment.

Blache, for the appellants.

D. Seghers, contra.

Martin, J. delivered the opinion of the court.

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The appellants complain of a judgment which dismisses their opposition to the appointment of Faures, as syndic, on the ground that it was not supported by their oath, according to the 18th section of the act relating to voluntary surrenders; 2 Moreau's Digest, 429.

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It is true this section of the law, requires the opponent's *written deposition*, and if an opinion was to be formed on this section alone, the judgment appealed from should be supported. But we are bound to compare it with the other parts of that act and other acts on the same subject. The question now under consideration, was lately before us in the case of *Cassidy vs. his creditors*, when this comparison was made, and the result was that the oath of the opposing creditor was not necessary; and we have not heard any thing in the present case which can authorize a change of opinion.

The District Court in our opinion erred in making the rule obtained by the syndic absolute, and in dismissing the opposition.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed, the rule discharged, and that the case be remanded for further proceedings according to law: the appellee paying the costs of the appeal.

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CHEVREMONT *vs.* FULTON ET AL.

APPEAL FROM THE COMMERCIAL COURT OF NEW ORLEANS.

CHEVREMONT
vs.
FULTON ET AL.

Where a contract is made for the sale of a quantity of cotton in bales, for such price as two brokers chosen by the parties shall name, the moment the brokers agreed upon the price the sale was complete, and no new conditions could be imposed.

This is an action to compel a compliance on the part of the defendants, with the sale of 103 bales of cotton to the plaintiff for a certain price, which he alleges was agreed on. He prays that the cotton be sequestered and that he have judgment for its delivery to him, or in default, one thousand dollars damages.

The defendants pleaded the general issue; and averred the plaintiff did agree to buy the cotton, but neglected to comply or pay the price to their great disappointment.

On these pleadings and issues there was judgment for \$100 and costs in favor of the plaintiff and the defendants appealed.

Benjamin, for the plaintiff.

Peyton, contra.

Morphy, J. delivered the opinion of the court.

Plaintiff sues for the delivery of 103 bales of cotton which he alleges were sold to him by defendants, and in default of such delivery, he prays for damages in the sum of \$1000, for the inexecution of the contract. The defendants deny that they made any such sale to plaintiff, or that plaintiff has any cause of action whatever against them. By agreement on record, the sequestration sued out by plaintiff was dissolved; defendants' bond cancelled, the claim for the delivery of the cotton waived, but plaintiff's rights reserved as to damages for the alleged breach of contract. There was a judgment below of one hundred dollars in favor of the plaintiff, from which the defendants prosecute the present appeal.

The evidence shows that on the 23d of May, 1839, Robert Mitchell, of the firm of Fulton & Co., sold to plaintiff one hundred and three bales of Texas cotton, at 13½ cents per pound. It appears that Mitchell, who had previously left orders with his clerk to sell this cotton, if fourteen cents were offered, found on his return to his counting house that the cotton had in the meantime been sold by his clerk at this price; unable to make delivery of this cotton, Mitchell told the plaintiff that he had a lot of 103 bales of Mississippi cotton, which he should let him have, in lieu of the Texas cotton, at such price as their brokers should set upon it. The brokers of the two parties accordingly met and, upon examination, valued the cotton at 13½ cents per pound. With this price, Mitchell was dissatisfied and tendered to plaintiff \$100 to let him off; this not being accepted, Mitchell then told him that he must take away the cotton on that very day. The plaintiff answered that he could not possibly do it, whereupon Mitchell proposed that the cotton should be received the next day at twelve o'clock, P. M., to which the plaintiff assented. The next day at one o'clock, P. M., plaintiff called on Longer, his broker, and told him that he was unwell and wished him to go and receive the cotton. Longer, after sending for his clerk who was engaged elsewhere, went up to the Union Press, where the cotton was stored; Longer's young man having arrived some time after, remarked that their ink to mark the cotton was out, whereupon it being near three o'clock, Longer told the clerk of the yard that he would call the next day to receive the cotton. He accordingly did go early the following morning, but was told by the clerk of the yard that Mitchell had left orders not to deliver the cotton.

It is contended on the part of the defendants that the existence of the sale was made to depend on the receiving of the cotton at twelve o'clock the next day; that it was a condition of the contract and that plaintiff having failed to comply with it, there was no obligation on the part of defendants to deliver the cotton afterwards. Two witnesses testify that they dis-

EASTERN DIS. tinctly heard Mitchell say that plaintiff should have the cotton
July, 1841. only in case he received it at twelve o'clock the next day.

CHEVREMONT but they cannot say whether plaintiff assented to this con-
VS. dition.
FULTON ET AL.

It is clear that the second contract was proposed by Mitchell as a substitute for the first, which had failed through his own fault in concluding with the plaintiff a bargain for the cotton,

when there was a possibility of its having been already sold by his clerk, as it turned out to be the case. The moment the

Where a contract is made for the sale of a quantity of cotton in bales, for such price as two brokers chosen by the parties shall name, the moment the brokers agreed upon the price the sale was complete, and no new conditions could be imposed.

brokers of both parties agreed upon the price, the sale was complete, and the receipt and delivery of the cotton were to take place within a reasonable time and according to usage in sales of this kind. Mitchell had no right to complain of the price or to affix to his agreement with plaintiff any new or unusual condition; such a modification of the substituted contract would have concluded the plaintiff, had his assent to it been clearly shown; but in the absence of any such proof we agree

with the judge below that Chevremont did not forfeit his contract by his omission to attend and receive the cotton at the hour named, and that he is entitled to damages for the breach of the same; having failed to execute the obligation they assumed, in lieu of their first contract, the defendants cannot complain when they are decreed to pay the sum which Mitchell, one of the partners, had himself proposed as a just indemnity.

The judgment of the Commercial Court is therefore affirmed with costs.

ELLIS vs. PREVOST ET AL.

EASTERN DIS.
July, 1841.APPEAL FROM THE COURT OF THE SECOND DISTRICT, FOR THE PARISH OF
TERREBONNE, THE JUDGE OF THE FOURTH DISTRICT PRESIDING.ELLIS
vs.
PREVOST ET AL.

In a possessory action, the civil possession of the plaintiff, preceded by an actual and corporal detention of the thing, will suffice, as it allows him the benefit of the previous corporal possession of his author.

The court do not recognize the doctrine, that there is but one kind of possession, and that civil possession will suffice in all cases of possessory actions.

Possession is acquired by the actual and corporal detention of the property; this is *natural*, or possession in fact; and it is preserved and maintained by the mere will or intention to possess, and this is civil possession, or possession in right.

So where a person is disturbed in his possession, he has the right, within a year, and by virtue of his civil possession, founded on his previous corporal and actual possession, to institute the possessory action to recover it.

The person claiming by possession alone, without showing any title, must show an adverse possession by inclosures, and his claim will not extend beyond.

This is a possessory action, to recover the possession of a tract of land on bayou Grand Caillou, in the parish of Terrebonne. The facts of the case are fully stated in a former report and judgment of this court. See 13 *La. Reports*, 230.

The cause was remanded for a new trial, and again submitted to a jury on the same evidence. There was a verdict and judgment for the defendants, and the plaintiff appealed.

Miles Taylor, for the plaintiff and appellant.

Isley & Nicholls, for the appellees.

Simon, J. delivered the opinion of the court.

This case was once before this court, and was remanded for a new trial. The judgment then appealed from had been rendered in favor of the defendants, and on the second trial before the court below, the jury having again found a verdict for the said defendants, the plaintiff, without attempting to obtain a new trial, brought up the present appeal.

The facts of this case, so far as it was then necessary to review them, are perhaps sufficiently stated in the report there-

19L	251
45	126
19L	251
47	405
19L	251
52	198
19	251
113	403
19	251
115	927

EASTERN DIS. of, 13 *La. Rep.*, 230; but as no additional evidence was produced by either of the parties on the second trial in the lower court, and as their rights stand now before us on the same footing and in the same situation as they were when first submitted to the consideration of this court, and present in some measure the same questions; we shall first proceed to re-examine in substance the extent and nature of the evidence, as by them originally adduced in support of their respective pretensions.

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The record shows, that on the 28th of June, 1836, plaintiff purchased from one John Hutchings, by a notarial act, a tract of land, containing thirty-six arpents in front, by forty in depth, on the east side of bayou Grand Caillou, and eleven arpents and one-third in front, by forty in depth on the west side of the said bayou; and that Hutchings had acquired the same from P. S. Cocke, by an act of sale executed on the 6th of February, 1829. That in the years 1829 or 1830, Hutchings took possession of the tract as owner, and put an overseer and seven hands upon it, who lived on and cultivated the place for about twenty-two months, built some cabins, girdled the trees on about one hundred and fifty arpents on the east side, raised a crop on said land, nearly opposite where Madame Prevost then and now lives, and that two individuals also cultivated the said land at different times by the permission of Hutchings. The plaintiff never resided there, and after his purchase, he abandoned the improvements made by his vendor. It is also established, that the defendants and their ancestors resided for a long time on the west side of the bayou, and that they occupied and cultivated at different periods an inconsiderable part of the land in controversy on both sides; it is not shown however, that the portions thus cultivated and which were unenclosed, were ever possessed by metes and bounds, but there is proof resulting from the testimony of the witnesses and from the plat returned by the surveyor, that their enclosures around the house on the west side have existed for a long time, and contain a small tract of four arpents in front, by two arpents and a half in depth, which is the spot which the defendants and

their father have actually occupied for a certain number of years before the institution of this suit. The evidence further shows, that about eighteen months previous to the first trial of this suit, (in March, 1838; the suit was brought in February, 1837,) two persons named Champagne and Daspit, came to reside on the land on the east side, with Madame Prevost's permission; the spot by them occupied is shown on the plat to be five arpents in front, by two and a half in depth.

Under the legal principles established in the former decision of this cause, which however we are not ready to adopt to the same extent, it is clear, that the plaintiff had a right to institute an action of possession against the defendants by virtue of his civil possession, based on the previous actual and corporeal possession of his vendor. This doctrine, so far as it requires the civil possession to be preceded by an actual and corporeal detention of the thing, and as it allows to the plaintiff the benefit of the previous corporeal possession of his author, appears to us to be correct, and we are not disposed to controvert it; but we cannot accede to the proposition, that our laws recognize but one kind of possession, and that a civil possession will suffice in all cases. We are aware, that the distinction between natural and civil possessions is peculiar to the Roman law, and among the French commentators of the highest authority on the Napoleon Code, there are several who consider it as having no sense or direct meaning. *Troplong, prescription, No. 239*, says: *Ces appellations de possession civile et de possession naturelle sont restées si vagues pour les modernes, que peut-être aujourd'hui encore l'on est indécis sur leur véritable sens.* But we are not able to say, that with us it is a distinction without a difference: it is evident from the different provisions contained in our system of legislation, that our laws, on this subject, too clear and too explicit to be disregarded, recognize two species of possession, natural and civil: natural possession, which may be called possession in fact, is, when a man detains a thing corporally, as by occupying a house, cultivating a field; and civil possession, or pos-

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In a possessory action, the civil possession of the plaintiff, preceded by an actual and corporeal detention of the thing, will suffice, as it allows him the benefit of the previous corporeal possession of his author.

The court do not recognize the doctrine, that there is but one kind of possession, and that civil possession will suffice in all cases of possessory actions.

EASTERN DIS. session in right, is, when a person ceases to reside in the house
July, 1841. or on the land which he occupied, but without intending to

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FREVOST ET AL. Another difference is established by *Pothier, on possession*,
No. 55; which, it seems to us, explains clearly the object and
meaning of the distinction made under our laws between na-
tural and civil possession; it is this: *Pour acquérir la posses-*
sion d'une chose, la seule volonté ne suffit pas; il faut une
préhension corporelle de la chose, ou par nous-mêmes, ou par
quelqu'un qui l'appréhende pour nous et en notre nom. Au
contraire, lorsque NOUS AVONS ACQUIS LA POSSESSION D'UNE
CHOSE, la seule volonté que nous avons de la posséder suffit
pour nous en faire conserver la possession, quoique nous ne
détenions pas cette chose corporellement, ni par nous-mêmes,
ni par d'autres. This distinction, therefore, is very obvious:

Possession is acquired by the actual and corporeal detention of the property; this is the *natural possession* or possession in fact; and it is preserved and maintained by the mere will or intention to possess; and this is the *civil possession* or possession in right. Now, in order to acquire prescription by the possession of ten years, founded on a just title, it is necessary, among other requisites, that the possessor should have held the thing in fact and in right as owner, (*ait possédé la chose naturellement et civilement,*) and yet, to complete a possession already begun, the civil possession shall suffice, provided it has been preceded by the corporeal detention of the thing. *La. Code, art. 3453.* So it is with regard to the right of possession: "*When a person has once acquired possession of a thing, by the corporeal detention of it, the intention which he has of possessing, suffices to preserve the possession in him, although he may have ceased to have the thing in actual custody, either himself or by others.*" *La. Code, articles 3405, 3406 and 3407.* Thus, if after having abandoned the corporeal possession of my house, or the cultivation of my field, I continue to possess it civilly; the intention which I have of possessing, will preserve the possession in me; unless a third person has usurped

or taken such possession from me, during the time required by law, or I have failed to exercise an actual possession for ten years; and if in the mean time, I am disturbed in my possession, I have the right before the expiration of one year, and by virtue of my civil possession, founded on my previous and anterior corporeal and actual possession of the property, to institute a possessory action to recover it.

This is undoubtedly the meaning of the *art. 49* of the Code of Practice, which must be construed in relation to the articles of the Louisiana Code on the subject of possession; this article says: "In order that the possessor may be entitled to bring a possessory action, it is required: 1st, that he should have had the real and actual possession of the property, *at the instant when the disturbance occurred*: a mere civil or legal possession is not sufficient." Now, we understand the expressions, *real and actual possession*, contained in this law, as used in contradistinction with the possession which is purely civil and legal, that is to say: with the possession, which is entirely devoid of the quality of having its source in or being derived from a previous actual and corporeal one; such possession is not sufficient; but when it has been preceded by the corporeal enjoyment of the thing, and the possessor has not ceased to exercise such enjoyment for ten years, the actual possession previously acquired is preserved and maintained, and it continues in the same manner and with the same effect, as if the thing had always been actually and corporally possessed. *Pothier, on possession, p. 314, No. 27, says: La possession, lorsqu'elle a été une fois acquise, se conserve plus facilement qu'elle ne s'acquiert; car 1o. nous pouvons rétenir la possession d'une chose sans que nous la tenions, et sans qu'aucun autre la tienna en notre nom. Par exemple: lorsque le propriétaire d'une maison qui y loge ordinairement, s'en va passer quelque tems ailleurs avec son domestique, sans laisser personne dans cette maison, il ne laisse pas d'en conserver la possession."*

It is clear, therefore, that if the *article 49* of the Code of Practice was to be construed strictly and according to its literal

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So where a person is disturbed in his possession, he has the right, within a year, and by virtue of his civil possession, founded on his previous corporeal and actual possession, to institute the possessory action to recover it.

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meaning, there would follow the absurdity, that if a person was to absent himself temporarily, and leave his house unoccupied for a certain lapse of time, he could not on his return bring a possessory action against an intruder, who would have taken possession of it during his absence, and would be obliged to resort to the petitory action; his adversary would always successfully oppose to him the plea in the words of the Code of Practice: that he was not in the real and actual possession of the house, *at the instant when the disturbance occurred*. This cannot have been the intention of the law giver; and such an interpretation is too absurd, to be for a moment countenanced at our hands. We must consequently conclude, that the possession acquired by the plaintiff's vendor, which possession is shown to have existed really and actually for more than one year, according to the extent and under the limits exhibited by the acts of sale, ought to enure to the benefit of said plaintiff; and that having not failed to exercise the said natural possession for ten years, the same was preserved in his favor by the civil possession, and was sufficient to entitle him to bring and maintain the present action.

With this view of the question, the plaintiff, under the evidence, would have a right to recover the whole tract, unless he is shown to have suffered a year to elapse after the disturbance, without bringing his possessory action, and unless the defendants have succeeded in establishing an adverse possession to it or to any part thereof during the period prescribed by law. *C. of Pr., art. 59; La. Code, art. 3419*. It is true, that the defendants have, at various times, occupied and cultivated, for a certain number of years, different inconsiderable parts of the land in dispute; but they have shown no possession according to metes and bounds of the land which was unenclosed, and the testimony is so vague and uncertain as to the extent of the several spots, which they have successively occupied, and of the limits of the fields which they may have cultivated, that it would be impossible to ascertain and indicate the fractions of the plaintiff's land, upon which they may have exercised their

alleged acts of possession. "*On ne peut pas posséder la partie incertaine d'une chose ;*" *Troplong, prescription, Vol. 1, No. 250.* In the case of *Prevost's Heirs vs. Johnson, 9 M. R., 123*, this court held, that when a person claims by possession alone, without showing any title, he must show an adverse possession by enclosures, and his claim will not extend beyond such enclosures. In the case of *Bernard vs. Shaw, 1 Martin, N. S., 490*, the facts proved established the plaintiff's right of possession, (as in this case,) to the whole body of land sued for; the defendant, however, gave in evidence his possession and cultivation of a field of fifteen arpents, but neither the pleadings, nor the evidence ascertained the particular spot where this possession was exercised; and the defendant's pretensions were disregarded. In the case of *M'Donough vs. Childress et al., 15 La. Rep., 560*, we said, that it was necessary, in an action of possession, not only to show acts of limited and restricted possession, but also to establish by legal evidence the extent and full limits of the property so possessed. These principles are clearly applicable to the present case; and as the defendants have not shown their adverse possession to extend, by metes and bounds, with any degree of certainty, beyond the enclosures of the spot shown on the surveyor's map, to contain four arpents in front, by two arpents and a half in depth, and as the evidence fully establishes their actual and continued possession for a number of years to the quantity of arpents of land comprised within their said enclosures, we are of opinion, that the said defendants should be maintained in their said possession of the said tract of four arpents in front, by two and a half in depth, on the west side of the bayou Grand Caillou; and that the plaintiff should recover the possession of the balance of the whole tract to the extent and limits described in his petition.

With regard to the parcel of land possessed by Champagne and Daspit, with the permission of the defendants, on the east side of the bayou; it is clear from the evidence, that they had not been in possession of it for one year, at the time of the in-

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The person claiming by possession alone, without showing any title, must show an adverse possession by enclosures, and his claim will not extend beyond.

EASTERN DIST.stitution of this suit, and that consequently, the defendants
July, 1841. cannot derive any benefit from their said possession.

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HEIRS
VS.
POOL.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and proceeding to give such judgment, as, in our opinion, ought to have been rendered in the lower court; it is ordered, adjudged and decreed, that the plaintiff and appellant do recover and be maintained in the possession of the tract of land described in his petition; except, however, of that portion of the said tract on the west side of the bayou Grand Caillou, shown in the surveyor's map to contain four arpents in front, by two arpents and a half in depth; and that the defendants and appellees be maintained in their possession of the said small tract according to the metes and bounds designated in the said surveyor's map; the costs in both courts to be borne by the said defendants.

BROADWAY'S HEIRS vs. POOL.

APPEAL FROM THE COURT OF THE THIRD DISTRICT, FOR THE PARISH OF
EAST FELICIANA, THE JUDGE THEREOF PRESIDING.

Evidence which is inadmissible to prove title, may be received to show possession by known marks and boundaries, which is good to sustain the plea of prescription.

The plea of prescription may be filed or amended on the trial, after the plaintiff has closed his evidence. It is a plea favored in law, and may emphatically be filed at any time.

This is an action in the nature of a petitory one, but also partaking of the character of an action of boundary. As the case has been remanded for a new trial on the merits, it is

unnecessary to go into a full report of it now. The opinion of the court fully explains the law points settled in it.

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In the court below the plaintiffs had judgment, from which the defendant appealed.

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PRINTS
VS.
POOL.

Lawson & Muse, for the plaintiffs.

Andrews, for the defendant.

Garland, J. delivered the opinion of the court.

This suit is instituted to recover thirty-two and 80/100 acres of land, which the plaintiffs say, belongs to them. The plaintiffs claim under William Hutson, who holds from R. M. Collins, and he under the same William Hutson, who it is alleged transferred his claim to Collins and then took it back again. The title arises from what is generally called a *donation claim* under the 5th, 6th, 7th, 8th and 9th sections of an act of Congress, approved 3d March, 1819, in relation to the settlement of land claims in the district east of the island of New Orleans; 1 Land Laws, 758. It is alleged the defendant has taken possession of a part of this land, has cut down the timber and committed trespasses, to the damage of plaintiffs, \$500. The prayer is a judgment for the land and damages.

The defendant denies generally the allegations in the petition and further says, "he holds his lands under one Isaac Polk, who settled there long before William Hutson. That when or after said Hutson settled there, a conditional line was agreed on between said Polk and Hutson, at a point on Richland creek, which conditional line would include the field now occupied on said creek by said plaintiff, including thirty acres which was taken from him by the surveyor, on the ground he could not go across the improvements of either of the parties." Wherefore he prays the original line may be restored and the said thirty acres decreed to be his property.

On the day the trial commenced the defendant filed a plea

EASTERN DIS. of "prescription of ten years under the act of Congress of
July, 1841. 1819."

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HINDS
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FOUL.

On the second day of the trial the defendant by leave of the court, withdrew his demand in reconvention and on the next day plaintiffs withdrew their claim for damages. The same day the defendant endeavored to reinstate his demand in reconvention, which was refused. The court would not receive evidence of the defendant's title and possession; he offered to amend his plea of prescription by making it more definite and particular, which the court refused on the ground it came too late. Nearly all the evidence offered by the defendant was rejected, there was judgment against him and he appealed.

This is evidently one of those vexatious neighborhood suits, which the members of an honorable and learned profession ought always to discourage rather than stimulate; and it seems to have been conducted in the court below by both parties, as much if not more, with a view of obtaining a triumph than the attainment of justice. The pleadings on the part of the defendant are, from negligence or design, drawn in such general and vague terms, as to make it difficult to know what he intended to offer in evidence, and to himself in some degree does he owe his defeat.

The record is made up almost entirely of bills of exceptions (seventeen in number) and the documents appended to them. Many of these bills are so frivolous as not now to require notice. We shall only give opinions on such of them as are necessary to the present disposition of the case.

In this court various efforts were made to dismiss the appeal, for alleged defects in the citation, its mode of service, the return day, and the manner of making the heirs of Esau Broadway parties. In relation to all the objections except the last, it is sufficient to say that the 19th section of the act of 1860, amending the Code of Practice, p. 170, cures the defects. As to the last objection, it was unnecessary, perhaps illegal, for the clerk of the District Court to have issued a citation to these heirs; but as it appears the order of this court making

them parties to the appeal was served on them we think it sufficient. EASTERN DEN.
July, 1841.

The ninth bill of exception is to the refusal of the judge to permit the defendant to put the following interrogatories to John L. De Lee, John Dickson, Elias Norwood and Benjamin Abbott:

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1st. What Broadway gave Hutson for the land, and whether the sale was or was not made by the acre and at two dollars per acre.

2d. Whether or not they did not hear Broadway say, he consented the line run by Bowling should be run at the time it was.

3d. Whether Broadway had not said, that he had agreed to purchase the land in controversy of the defendant.

4th. Whether they or some of them were not called on, in or about the year 1827, by defendant, to go with him to forbid Broadway from cutting timber on the land.

5th. If there was not a turn in the lane, which passed between the improvements of the parties, and if the lane was not now in the same place it was when Bowling run the line.

We think the judge erred. The testimony though inadmissible to prove title, went to show a possession by known marks and boundaries, and was good to sustain the plea of prescription.

Evidence which is inadmissible to prove title, may be received to show possession by known marks and boundaries, which is good to sustain the plea of prescription.

The eleventh bill of exception is to the opinion of the judge refusing defendant leave to amend his plea of prescription after plaintiffs had closed their testimony and whilst defendant was offering his. The bill states "the court having refused to receive evidence of the defendant's title to the premises in dispute," he offered to amend his plea of prescription. The amendment does not seem to change the character of the plea, but to make it more specific, setting out the character of the title under which he holds, and the length of possession. The court refused leave to amend on the ground it was too late. The defendant then offered to file a new plea, which comes up with the bill. This the judge would not permit him to do.

EASTERN DIS. The judge was of opinion that although a plea of prescription
July, 1841. may be filed at any time during the progress of the cause, yet

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The plea of prescription may be filed or amended on the trial, after the plaintiff has closed his evidence. It is a plea favored in law, and may emphatically be filed at any time. The plea of prescription may be filed at any time, even on the appeal; C. Pr., art. 346. It therefore seems a little strange, that if the whole plea can at any time be filed, that an amendment cannot. Courts must take care plaintiffs are not surprised by the filing of such pleas; and if the defendant waited until his adversary's testimony was closed, the court could have opened it again, if necessary for the purposes of justice. Prescription is a plea favored in law, being calculated to arrest suits, the stirring up of antiquated claims, and the preservation of the peace of society. "It is a statute of repose." 1 Peters, 360.

The judgment of the District Court is therefore annulled, avoided and reversed, and the cause remanded to the court below for a new trial, with directions to the judge to permit the defendant to file his plea of prescription, and not to reject the testimony mentioned in the ninth bill of exception, and otherwise to be proceeded in according to law; the plaintiffs paying the costs of this appeal.

GILLISPIE vs. DAY.

EASTERN Dis.
July, 1841.

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF ST. HELENA.

GILLISPIE
vs.
DAY.

Where the defendant made a verbal donation of a slave to his son, and at his death, as one of a family meeting advised the sale, as the property of the minor child of the deceased, he cannot claim back either the slave or the proceeds, although the donation *per se*, did not divest him of title.

191	263
40	309
40	756
40	758

The donor is only entitled to the reversion of the thing donated, when the donee dies without posterity, and it is found in his succession.

A witness testifying to the extra judicial confessions, verbally made, of a deceased person, is the weakest of all testimony; as it cannot be contradicted, or the witness convicted of perjury although he may swear falsely.

So, proof by one witness to a single confession of an aggregate amount above 500 dollars is insufficient without some corroborating circumstance; although if the witness testified of his own knowledge to two successive loans or sums, amounting together to more than \$500, the evidence might be sufficient.

This is an action by the widow of Thomas W. Day, deceased, against his father, Wm. Day, to recover the amount of her deceased son's estate, now in his hands, and which she alleges she is entitled to receive as his sole heir; being her only child, who died after her husband.

The defendant was appointed tutor of his grand-son, and had the administration of his estate. The plaintiff prays judgment requiring the defendant to account for his tutorship, and pay over such balance as may be found due and in his hands.

In his defence the defendant sets up claim to a slave named Stephen or his proceeds, which he avers he merely loaned his son, but who remained in his succession after his death, and was sold at the sale of it, on the advice of a family meeting, of which the defendant was a member. He also claims the sum of \$550, which he states he also loaned his son. He admits there is cash on hand and assets of his grand-son's estate amounting to \$4,537 92, out of which he claims \$1,986 68, as the price of the slave; and \$550 for the sums loaned.

There is a bill of exceptions to the testimony of the only

EASTERN DIS. witness called to prove the item of \$550. He says Thomas
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W. Day told him, in his lifetime, that the defendant, his father, had furnished him with \$300 to aid him in paying for a negro girl named Charlotte; and also told him that the defendant, his father, furnished him with \$250 to pay for land, to which testimony the plaintiff's counsel objected, as being hearsay. The objection was overruled, the testimony admitted and the plaintiff excepted.

There was judgment allowing the defendant's claims as set up in his defence, and the plaintiff appealed.

Sheafe, for the plaintiff and appellant.

Lawson, contra.

Bullard, J. delivered the opinion of the court.

The defendant is the grand-father of William Day, junr., and became his tutor after the second marriage of the plaintiff, his mother, and received the proceeds of the estate of Thomas W. Day, the father of the minor child. Upon the death of the grand-son, his mother inherited his estate as sole heir, and this action is brought to compel William Day, the grand-father, and late tutor, to render an account of his administration.

The defendant claims, 1st, allowance for the price of a slave Stephen, which in his answer he alleges was *loaned or given* by verbal agreement to his son Thomas W. Day, the father of the minor, and that the slave either belonged to him, the respondent, or he was entitled to the proceeds thereof by reversion, the act being invalid as a donation; and 2d, for \$550 loaned to his son.

Where the defendant made a verbal donation of a slave to his son, and at his death, at one of a family meeting advised the male as the pro-

I. We are of opinion that the defendant is precluded from setting up any title or claim to the slave Stephen or the price for which he was sold. Admitting the title to have been in him previously, and that the verbal donation *per se*, was insufficient to divest him, yet the defendant, as a member of the

family meeting, advised the sale of the property and suffered the slave to be sold as the property of his son Thomas W. Day; and in an act of partition in the record, and signed by the defendant, the price of the slave is set down as forming a part of the estate which came into his hands as tutor of the heir at law. Nor can we recognize the defendant's right as reversioner on the authority of the case of Prejean's heirs vs. Le Blanc, (3 La. Rep., 22;) upon which the counsel relies. The donee, T. W. Day, did not die without posterity which we have recently decided to be an indispensable condition to the right of reversion or return; Rouanet vs. Hunt, (tutor,) 17 La. Rep., 409.

II. With respect to the defendant's claim to retain \$550, averred by him to have been loaned to his son, a single witness deposes that Thomas W. Day, the son, told him in 1834, that his father, (the present defendant,) had furnished him with 250 dollars to pay for land purchased of John Allen, and he told witness that his father furnished him with 300 dollars or upwards, the precise amount not recollected, to aid him in paying for a negro girl by the name of Charlotte.

This kind of evidence, not hearsay, as was contended, but the extra judicial confessions verbally, of deceased persons is the weakest of any. It cannot even be contradicted, much less can the witness be convicted of perjury. The only witness to disprove the confession no longer exists. But the testimony of a single witness is insufficient without corroborating circumstances, to prove a debt above \$500. It is true that if a single witness were to depose to his knowledge of two successive loans amounting together to more than \$500, the evidence might be sufficient, because that would be proving two distinct contracts. But proof by one witness to a single confession of an aggregate amount of more than \$500, is in our opinion insufficient without some circumstances in corroboration. What is there in the case to strengthen the statement of the witness? Let it be observed in the first place that the confession was not that the father had loaned but that he had

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party of the minor child of the deceased, he cannot claim back either the slave or the proceeds, although the donation *per se*, did not divest him of title.

The donor is only entitled to the reversion of the thing donated, when the donee dies without posterity, and it is found in his succession.

A witness testifying to the extra judicial confessions, verbally made, of a deceased person is the weakest of all testimony; as it cannot be contradicted or the witness convicted of perjury although he may swear falsely.

So, proof by one witness to a single confession of an aggregate amount above 500 dollars is insufficient without some corroborating circum-

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DAY.

stance; al-
though if the
witness testified
to his own
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amounting to-
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than \$500, the
evidence might
be sufficient.

furnished the son with the money, and although in ordinary cases it would amount to the same thing as there would exist an obligation to refund. Yet between the father and his son, about to establish himself in the world, the former might be presumed, without much violence, to intend an advancement or donation. When settling the estate of the son no such claim was pretended. If the alleged loan was made after the marriage of the son it was a community debt, and the community was settled with the widow by the defendant himself, without advancing any such pretensions. These circumstances satisfy us that the setting up of such a claim against the grandson's estate is an afterthought, and that the money was furnished not as a loan but as an advancement.

The court in our opinion erred in allowing an offset for the value of the slave Stephen and for the 550 dollars.

The judgment of the Court of Probates is therefore reversed, and proceeding to render such judgment as ought to have been given below, it is further decreed that the plaintiff recover of the defendant four thousand, one hundred and eighty-three dollars and ninety-two cents, the balance in his hands as tutor of William Day, junr., together with interest at five per cent. from and after this day, July 8, 1841, with costs in both courts.

HOOPER ET AL. vs. WHITNEY.

EASTERN Dist.
July, 1841.

APPEAL FROM THE COMMERCIAL COURT OF NEW ORLEANS.

HOOPER ET AL.
vs.
WHITNEY.

The effect of a valid abandonment of the object or property insured, is to transfer it to the underwriters, who take the place of the insured.

The underwriters are subrogated to the rights of the insured by the abandonment, which also goes to include the *specie recuperandi*.

So a sale of a vessel at the port of necessity, by the master, under necessitous circumstances, vests the purchaser with a good title. The insured, after abandonment, cannot set up any claim, or maintain an action against the purchaser to recover her.

This is an action by the late owners of the ship Bombay, to recover her from the defendant, who is a third purchaser and owner, after she had been sold as a wreck, and abandoned by the plaintiffs', her owners, to the underwriters.

The facts of the case are so fully stated in the opinion of the court, that it is unnecessary to recapitulate them.

The cause, after an elaborate investigation, with a mass of testimony relating to the loss, abandonment, sale, purchase and repair of the vessel, &c., was submitted to a jury. There was a verdict and judgment for the defendant, and the plaintiffs appealed.

Roselius, for the plaintiffs and appellants.

Grymes & Benjamin, for the defendant.

Garland, J. delivered the opinion of the court.

The object of this suit is to recover from the defendant a ship called the Bombay, which the plaintiffs allege belongs to them, together with \$10,000 damages. A writ of sequestration was asked for and obtained; the ship sequestered and released, upon giving bond as required by law.

The defendant, for answer, says this action cannot be maintained, because, if the plaintiffs ever had any right or title to the ship, which is not admitted, they have transferred and abandoned all their rights to certain insurance companies who had taken and held risks upon the vessel at the time of the loss,

EASTERN DIS. and at the institution of this suit, no right existed in the plaintiffs.
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For further answer, the defendant says, he is in possession of said ship by a legal and just title. He avers that the Bombay, on or about the 5th of February, in the year 1838, departed from New Orleans on a voyage to the port of Boston, then belonging to persons unknown to him. That she was wrecked near the Tortugas, but by the assistance of the wreckers on the coast, was got off the reef in a leaky and sinking condition, and afterwards abandoned by the captain, crew and sailors as being wholly worthless and unseaworthy, and incapable of being brought into any port where she could have been repaired. That prior to being so abandoned, the vessel was stripped by the sailors of all her apparel, tackle and furniture, which was carried to Key West, libelled and sold, and the hull and masts left, without the master having any means of saving her, at a distance from any place where repairs could be made. The master being fearful that if he delayed, until he could hear from the plaintiffs, the hull would be lost, had it sold at public auction at Key West, where it was adjudicated to Tifts & Co. for \$1450, who paid the money and received a bill of sale for the vessel. That afterwards defendant, in behalf of himself and partners purchased the ship from Tifts & Co. for \$12000; they having previous to the sale expended a large amount in repairs and refitting her and labor in raising and getting the water out of her. That in the sale at auction, the master acted as the agent of all concerned; that it was a case of extreme and eminent necessity that justified the sale, which was made in good faith and in the exercise of a sound discretion, under circumstances that warranted it, wherefore it is good and valid. He further says the sale has been ratified and approved by plaintiff.

It is further alleged, that in the event of the court being of opinion that the sale is not valid, then the defendant is entitled to \$25,000 for salvage, repairs and other expenses in saving the ship and refitting her, for which he prays judgment and claims a lien.

Sometime after this answer, the plaintiffs filed a supplemental petition alleging fraud and collusion between the captain of the ship and Tifts & Co., the wreckers and purchasers. He says the captain was bribed by the wreckers to sell and sacrifice the ship, when there was no necessity for so doing. That the whole proceeding was illegal, fraudulent and collusive, and cannot divest petitioners of title, of all of which the defendant was well aware before he purchased. To this the defendant filed a general denial.

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The evidence shows that the plaintiffs were the owners of the *Bombay*; they chartered her to the Messrs. Lombard, of Boston, to make one or more voyages from that port to New Orleans, and at the instance of the charterers, the owners appointed Micah Humphreys the master. The vessel was insured by the Atlas and Columbian Insurance Companies in Boston, for \$35,000. She sailed from New Orleans on the 5th of February, 1838, and struck on the Loggerhead reef near Tortugas, on the night of the 10th, being at the time under full sail. A few minutes after the ship struck, a signal was made for assistance; several wrecking vessels being in sight, they immediately came on board, and told the captain in reply to his request for immediate help, they could give him no other assistance than to take out his cargo, and that the sea was too rough for them to come alongside then. The ship remained on the reef several days, when about a third of her cargo was taken out, she got off, and after much difficulty was taken into Tortugas harbor, where she was unloaded, the cargo taken to Key West; the ship stripped of her sails, rigging, tackle and furniture, leaving her hull with the masts and spars only at Tortugas, which is an island inhabited only by the keeper of the light-house and his family.

The news of the ship being wrecked was communicated by the master on the 17th of February, by a vessel bound to New York or Boston, and was published in the papers of the latter city on the 8th of March. On that day, the plaintiff, Robert Hooper, Jr., made an abandonment as for a total loss to the

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Columbian Insurance Company, and on the next day John Hooper, Jr. made a similar abandonment to the Atlas Insurance Company. Before the expiration of the sixty days from the time of abandonment, the plaintiffs received \$5000 on account of the policy from the Columbian office and on the 9th of May Robert Hooper addressed a second letter to the president of that company demanding payment of the balance due on account of the loss, referring to his previous abandonment. On the 10th of March captain Gifford was sent to Key West by the owners of the ship and cargo, to look after their interests, which place he reached on the 5th of April. From him information was received, upon which, on the 26th of April a power of attorney was sent to him by the plaintiffs and the insurance companies, by which they jointly and severally authorized Gifford to demand of any and all persons the custody of the Bombay, "and in our names as the lawful owners of said ship, to take the actual custody and possession of the same, her tackle, apparel and furniture," and against all persons who may refuse or resist him in taking such possession, "in our names to pursue or institute any libel, process, suit or claim in admiralty or at common law," and the same to prosecute "in our names and behalf." At the time of the execution of this procuration, a paper was signed by all the parties, stipulating that the rights the plaintiffs had against the insurance companies should not be prejudiced by the act.

Soon after the reception of this power this suit was instituted, and the defendant says it cannot be maintained, as the plaintiffs, by their abandonment and receipt of a part of the money due on the policy, have divested themselves of all right or title, and the same is vested in the insurance companies.

The effect of a valid abandonment of the object or property insured, is to transfer it to the underwriters, who take the place of the insured.

It is a well established principle, that the effect of a valid abandonment is to transfer the property in the object insured. The payment of a total loss by the insurers or their liability to pay such a loss in consequence of an abandonment, gives them a title to the property or what remains of it; 2 Phillips on Insurance, 417; Ed. 1841; Marshall on Insurance, 600; 5 Mar-

tin, N. S. 371. The Supreme Court of the United States in EASTERN DIS. July, 1841. a case in 4 Peters 139 and another in 6 Cranch 268, say, an abandonment if legal, puts the underwriters completely in the place of the assured, and the agent of the latter immediately becomes the agent of the former. The correctness of this doctrine is not denied by the counsel for the plaintiff, but he says an abandonment after it has been accepted, may be revoked or suspended if the parties agree to it. This is no doubt true, but the question arises how does the admission operate on this case? That the parties have not agreed to revoke the abandonment is clear, from the agreement entered into, when the power of attorney to Gifford was executed. The rights of the plaintiffs on the insurance companies were not to be affected by it. Has there been any suspension of the abandonment? It would not seem so, from the fact that one of the plaintiffs called on the underwriters for the whole amount of the loss within fifteen days after the power of attorney was executed. The underwriters are subrogated to the rights of the insured by the abandonment, which also goes to include the spes recuperandi. The underwriters are subrogated to the rights and interests of the insured; 5 Paige 285; and the abandonment goes so far, as to include the *spes recuperandi*; 2 Phillips Ins. 420. It is not easy to imagine a more complete investiture of rights and no formal deed of cession is necessary to pass them.

The counsel for the plaintiffs contends their abandonment is not legal, as the injury sustained by the ship was not of the value of one half of her after she was repaired. This argument might be a formidable one if the case were between the plaintiffs and underwriters, in behalf of the latter, but it cannot be properly urged against a third person, to deprive him of that which he appears to have purchased in good faith, at the same time it appears the plaintiffs are holding on to their claim for a total loss against the underwriters. But to waive any such objection, we are satisfied the injury or loss amounted to more than half the value of the vessel after she was repaired, deducting a third of new for old.

The evidence satisfies us, the ship could not have been thoroughly repaired at Key West, if the captain and wreckers

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could have carried her there, when she was gotten off the reef. The most that could have been done, would have been to patch her up, so that she could reach another port. Very little more could have been effected at Key West than was done at Tortugas harbor, and the risk to the vessel of making repairs at the former place was greater than at the latter, from the fact of the harbor being more exposed. The vessel must necessarily have been brought to New Orleans or carried to a more distant port, the risk and trouble of which ought to be taken into consideration. Marcy & Bailey, who are ship carpenters, and had ample opportunities of examining the ship, say this would be worth at least \$10,000, the repairs in New Orleans, according to Robertson's estimate, which includes cables and anchors and some expenses that are included in the above sum, amounted to about \$8000, which makes the sum of \$18000. The testimony as to the value of the vessel after she was repaired, shows she was not worth more than \$28,000, then deduct the third, of new for old, which applies to the materials, and not the labor, from the \$18,000, and more than half the value will remain; if this calculation was to be made of the costs of repairs at the port of necessity (Tortugas) it would be more onerous on the plaintiffs, and increase the costs. As the cause is now presented to us we think there were sufficient grounds to authorize the abandonment for a total loss.

So a sale of a vessel at the port of necessity, by the master under necessitous circumstances, vests the purchaser with a good title. The insured, after abandonment, cannot set up any claim, or maintain an action against the purchaser to recover her.

The plaintiffs therefore stand before us divested by their own act of all rights to the vessel, and cannot recover it. We know of no law that authorises a party, who has parted with all his rights to property and subrogated another to them, that will authorize him to set up title and recover the thing in the hands of a third person, under the pretext that the benefit is to result to the subrogated party, without it being so alleged.

The judgment of the Commercial Court is therefore affirmed with costs, without prejudice to the rights of the underwriters.

SKINNER & KENNEDY vs. WESTERN MARINE AND FIRE INSURANCE COMPANY. EASTERN Dis.
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APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

**SKINNER &
KENNEDY
vs.**

**WESTERN
MARINE & FIRE
INSURANCE CO.**

Memorandum articles are liable to no constructive or total loss, so long as they continue of any value; although they are so damaged as to be rendered absolutely of no value, still if they remain *in specie*, or can be designated by the same name, the underwriters are not liable for a total loss.

So where a boat, loaded with pork in bulk, and some flour and beans, was partly destroyed by fire, but the bottom floated on to the port of destination, with about 11 per cent. of the cargo of pork, it being much roasted and barbecued, yet was recognized *as pork*. Held that the insurers were not liable as for a total loss.

This is an action on a valued policy of insurance on a cargo of pork in bulk, beans and flour, valued at \$3480; the voyage commencing at Vicksburg and to continue until the flat-boat in which said cargo was shipped, landed safely, and moored in the port of New Orleans. On her way down she took fire about 10 leagues above the city and burnt nearly to the water's edge. The bottom however floated down with the pork in a damaged, barbecued condition, which was sold at nearly a total loss, and the plaintiffs, who are the insured, abandoned to the underwriters as for a total loss. They pray judgment for the value, to wit, \$3480.

The defendants denied that there was such a cargo as was represented, but that it was made up with a view to defraud them; and no cargo of the value claimed ever existed, either before or at the time of the alleged loss by fire; and that said loss, if any, was occasioned by plaintiffs' fault and with a view to defraud them. They pray judgment in their favor.

On the issues thus made up, and the evidence showing the cargo, the value of which is claimed, to be composed of memorandum articles, and perishable; there was a verdict and judgment for the defendants, and the plaintiffs appealed.

Grymes, for the plaintiffs and appellants.

Maybin, for the appellees.

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Bullard, J. delivered the opinion of the court.

SKINNER &
KENNEDY.
vs.
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INSURANCE CO.

This is an action upon a valued policy, and the insured claim for a total loss by fire, which is one of the perils insured against. The merchandize insured was bulk pork, beans, and flour, valued at \$3480, laden on board a flat-boat bound from Vicksburgh to New Orleans. The boat was destroyed by fire about thirty miles above New Orleans, except the bottom, which was afterwards floated down to the city with a remnant of the cargo, much injured by fire. That remnant amounted to 7723 lbs., represented by the port-wardens as the whole more or less damaged by fire and unmerchantable. It was sold at auction and brought 2½ cents per pound.

The defendants deny all the allegations in the petition except the execution of the policy, and they further say that the plaintiffs never had on board the boat the articles or property insured, nor had they, with intention to defraud the defendants, the whole interest, valued by these respondents, at risk at any time at or since the said insurance and that the loss, if any, was occasioned by the fault or fraud of said petitioners.

There was judgment in the District Court for the defendants, and the plaintiffs appealed.

The defence in this court rests on two grounds, which have been argued, to wit: that the insured never had at risk the amount of produce represented by them, and that the loss was occasioned by their own fraud or fault; and secondly that the produce insured, was composed altogether of memorandum articles, and that a real total loss has not been shown so as to entitle the insured to recover.

Memorandum articles are liable to no constructive or total loss, so long as they continue of any value; although they are, so damaged as to be rendered absolutely of no value, still, if they remain in specie, or can be designated by the same name, the underwriters are not liable for a total loss.

The view we have taken of the second ground renders it useless to inquire into the first.

The doctrine in relation to memorandum articles is well settled at the present day; as it relates to them there is no constructive total loss. So long as they continue to be of any value the underwriters are not liable for a total loss. And from most of the cases, says Phillips, it seems that although

they are so damaged, as to be rendered absolutely of no value, still if they remain *in specie*, if they so subsist that they may still be properly designated by the same name, the underwriters are not liable for a total loss; 1 Phillips, 487.

Lord Mansfield held in regard to a cargo of fish, which was absolutely spoiled, yet which arrived and still existed *in specie*, so that it might still be called *fish*, that the assured could not recover. (Same.)

In the present case, flour and pork in bulk, are expressly declared by the policy to be warranted free from average unless general.

The pork which arrived in port amounted to about eleven per cent. of the alleged cargo, and although much damaged by fire, was yet easily recognized as pork. It has been contended that pork roasted or barbecued as this was, could no longer be properly called bulk pork. By bulk pork we understand that which is not put up in barrels; it is true, it is understood to be in its raw state, and not roasted, broiled or barbecued. But according to the current of authorities, the test is that it should remain *in specie*, and still properly designated by the same name. Now, although partially prepared for consumption by cooking, and having undergone a partial chemical change, the pork was still pork, and if not in barrels and packed up, was still in bulk, a mere accidental condition of the thing. A ham either boiled or roasted is still a ham, as much as a rotten fish is still a fish, although the former is no longer raw, and the latter by the process of decay may have become utterly useless, as an article of human food, yet still retained the external form of fish. The case of the rotten fish was certainly very strong—much stronger than roasted salt pork; the latter was still eatable, though not merchantable, while the former, by a slower chemical process of putrefaction had become loathsome. Both these cases are distinguishable from the *pâté de foie gras*, supposed in the argument by the counsel for the appellant. It is true such a pie is no longer goose livers, but the reason is, not that the livers are cooked, but that being

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So where a boat, loaded with pork in bulk, and some flour and beans, was partly destroyed by fire, but the bottom floated on to the port of destination, with about 11 per cent. of the cargo of pork, it being much roasted and barbecued, yet was recognized as pork. Held that the insurers were not liable as for a total loss.

EASTERN DIS. combined with various other ingredients and condiments a new article of food is produced by the culinary art, believed to be an agreeable compound.

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MARINE & FIRE
INSURANCE CO.

In the present case we are of opinion that the plaintiffs have failed to show, either that total physical extinction of the thing insured or total destruction of value, which would entitle them to recover under the policy. A part of the cargo arrived at the port of destination, deteriorated it is true, by fire, but still *in specie*. Nor was there in this case such a breaking up of the voyage as authorized the insured to claim as for a total loss. The damage happened within a short distance of the port of destination, and the bottom of the boat proceeded in safety with a remnant of the cargo; 1 Wheaton, 219; 2 Phillips, 339.

The judgment of the District Court is therefore affirmed, with costs.



VAUGHAN vs. WESTERN MARINE AND FIRE INSURANCE COMPANY.

APPEAL FROM THE COMMERCIAL COURT OF NEW ORLEANS.

The fact of the property of the insured, being purchased by his son at a sale made by the master of the damaged cargo, is not sufficient to prove that the purchase was made on account of his father, or in any manner to affect the validity of the sale.

This is an action on a policy of insurance taken out of the office of the defendants, and which it is alleged covers the loss on 25 hogsheads of tobacco, estimated at \$1500; which was shipped with other tobacco on the flat-boat called the Lady

Marshall, James Saunders, master; and which was sunk in Green river, by one of the perils insured against; abandoned to the underwriters as a total loss, and sold in its damaged state, by the master for account of all concerned; and it was purchased by the plaintiff's son.

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VS.
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MARINE & FIRE
INSURANCE CO.

The defence is, the plea of the general issue; and that the proceedings in selling the tobacco are illegal, the sale pretended and that the plaintiff has no cause of action.

There was a verdict and judgment for the amount claimed and the defendants appealed.

Peyton & Jones, for the plaintiff and appellee.

Maybin & Grymes, for the appellants.

Morphy, J. delivered the opinion of the court.

The circumstances of this case are the same as those of *Robertson & Brummell* against the same defendants, decided this day; *ante* 267. The plaintiff's claim for a total loss is under the same policy and for tobacco shipped on board of the same flat-boat. The evidence is therefore precisely the same in relation to the accident which occasioned the loss and the subsequent disposition of the tobacco. The only difference between the two cases is, that in the present the plaintiff did not buy in his tobacco. It appears from the evidence that plaintiff was not present at the sale; was residing at a distance of about seventy miles from the spot where the sale took place and did not in any way, before or after the sale, interfere with or exercise any control over the tobacco. It was purchased by Wm. H. Vaughan, a son of the plaintiff, who was a tobacco trader residing in Green county. In the absence of any other circumstance the jury were perhaps of opinion, and we cannot say they erred, that the mere fact of the close connection subsisting between the plaintiff and the purchaser was insufficient to prove that the purchase was made for the account of the former.

The judgment of the commercial court is therefore affirmed with costs.

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FERGUSON & HALL ET AL. vs. THEIR CREDITORS.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

FERGUSON
& HALL ET AL.
vs.
THEIR
CREDITORS.

19L 278
46 1358
19L 278
51 128
51 129

The syndie cannot claim the reversal of a judgment which reduces claims on his tableau, and when he and none of the creditors whom he represents are aggrieved.

So where a creditor's claim is reduced from a privileged, to an ordinary one, and he does not appeal, the syndie representing the *mass* of creditors, who are benefited, cannot appeal or have the judgment altered.

A privileged claim of the vendor, will not be allowed on goods, mingled with an old stock, and when none of them are identified.

The facts of this case are principally stated in the opinion of the court, and the agreement of counsel, embodied in it.

The controversy arose on oppositions made to the tableau of distribution filed by the syndie.

The judgment of the District Court made several alterations, by reducing some claims in amount and others in rank, from a privileged to ordinary ones, which enured to the benefit of the mass of creditors.

The syndie presented his petition of appeal, alleging that in the judgment rendered on the opposition to the tableau filed by him, there was error so far as certain oppositions were maintained. An appeal was granted to the syndie, who alone is appellant.

Benjamin, for the appellant, and on the part of the syndie, stated the case, and raised various points in favor of creditors who had not appealed, and insisted that the judgment be reversed, and one given in accordance with the agreement of the parties, and according to the suggestions of the syndie.

Lockett, Micou & Carter, also appeared as counsel for certain creditors.

Martin, J. delivered the opinion of the court.

The syndie is appellant in this case from a judgment sustaining several oppositions, and making various amendments to his tableau.

The parties have agreed that the judgment be affirmed as to the oppositions of Norris and Sorbé, and the claim of R. H. White; and that it be reversed as to the claims of J. P. Benjamin; and S. T. Hobson & Co. as to the *amount* of the latter, which are to be maintained.

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July, 1841.

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& HALL ET AL.
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THEIR
CREDITORS.

The decision of this court is solicited on the following points only :

1. Whether the claim of R. M. Carter, Esq. is to be maintained at \$500, or reduced to \$250, as adjudged by the court.

2. Whether the claim of P. Cenaz, auctioneer be maintained at \$340 as placed on the tableau, or reduced to \$15, as adjudged by the court.

3. Whether S. T. Hobson & Co. are ordinary or privileged creditors.

4. Whether J. H. Martenstein is an ordinary or a privileged creditor.

I. & II. With regard to the claims of Carter and Cenaz, the one attorney of the insolvents, and the other auctioneer appointed to sell the surrendered property and effects, whose claims have been reduced, and who have not appealed, we are unable to see on what ground, the syndic seeks relief, as neither he or any of the insolvents' creditors whom he represents, are aggrieved by the judgment of the inferior court.

The syndic cannot claim the reversal of a judgment which reduces claims on his tableau, and when he and none of the creditors whom he represents are aggrieved.

III. The same observations apply to the claim of Hobson & Co. who were reduced from privileged to chirographic creditors, as were made on the two preceding claims of Carter and Cenaz. They might have sought relief at our hands; and they only, (not the syndic) for the reduction, if illegal wrought no injury to any one but themselves. To the *mass of the creditors* whose interests the syndic represents, it was beneficial; as it diminished a number of competitors, amongst the privileged ones, and increased the fund from which the others were to be paid. The syndic therefore had no right to appeal, as thereby he could only place the creditors *in duriori casu*, and charge them with the costs of a litigation worse than useless.

So where a creditor's claim is reduced from a privileged, to an ordinary one, and he does not appeal, the syndic representing the *mass* of creditors, who are benefited, cannot appeal or have the judgment altered.

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IV. As to Martenstein, the tableau was amended by taking him from the list of ordinary creditors, and placing him as a privileged one for \$2800 with interest, &c. The counsel for the syndic has referred to the statement in the brief of the attorney of the creditors who oppose this claim. He states that the goods on which Martenstein claims his privilege had been sometime previously sold to the first firm of the insolvents and mingled with the stock of goods on hand, and which had been transferred from the firm of Ferguson & Hall to that of Ferguson & Cotte. That a witness states a quantity of goods were pointed out to him by the insolvents as having been purchased from Martenstein, and that he supposed that if the whole stock surrendered was worth \$30,000, that this "old stock, said to have been bought of Martenstein, must have been worth as much as \$3,000." This circumstance, when it is considered that the business had been conducted by the insolvents for four years or more; who were constantly selling and buying goods; added to the fact that in the inventory by which the sale was made, not a single article is identified as belonging to Martenstein, and no witness produced to identify any part of the goods, there can be no foundation for a privileged claim.

A privileged claim of the vendor, will not be allowed on goods, mingled with an old stock, and when none of them are identified.

The judgment, as respects the *amount* of the claims of J. P. Benjamin, and of S. T. Hobson & Co., having reduced these claims, and being more favorable to the mass of creditors, cannot be the subject of complaint of the opposing creditors, because they have obtained what they asked for, and they claim no further deduction; nor of the syndic because it is his duty to support the judgment.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed; except so far as it concerns the claim of J. H. Martenstein, and that it be reversed as to him: and ours is that he be re-instated on the tableau as a chirographic creditor, for the amount of his claim.

REPORTS
OF
CASES ARGUED AND DETERMINED
IN
THE SUPREME COURT
OF
THE STATE OF LOUISIANA.

WESTERN DISTRICT.
OPELOUSAS, SEPTEMBER TERM, 1841.

BARRETT vs. BULLARD.*

APPEAL FROM THE COURT OF THE FIFTH DISTRICT FOR THE PARISH OF

ST. LANDRY, THE JUDGE OF THE NINTH PRESIDING.

Where the plaintiff makes *that hardly probable*, which he was bound to make certain, and there is a verdict against him, he is not entitled to be relieved; but if the verdict is against the defendant in such a case, a new trial ought to be granted. WESTERN Dis.
September, 1841.

BARRETT
vs.
BULLARD.

In a redhibitory action for the rescission of the sale of a slave, a tender or offer to return the slave, must be proved at the trial, to have been made before suit.

This is a redhibitory action. The plaintiff alleges that in April, 1835, he purchased the slave Titus from the defendant for the sum of \$650, payable in a promissory note signed by James Walsh and endorsed by this petitioner. That shortly

* Judge Bullard being the party defendant did not sit in this case. Judge Simon was absent, on account of sickness, during the terms of the court here and at Alexandria, this year.

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BULLARD.

after the sale he discovered the slave was afflicted with a severe chronic disease of the kidneys, which must have existed at the time and before the sale; and which rendered him wholly useless and worthless; being unable to perform any service or labor.

The plaintiff further alleges that he informed the defendant of the disease with which the slave was afflicted and tendered him, and requested the defendant to take him back and return the note given for the price, or the money in lieu thereof, but that he refused and still doth refuse. That he has placed said slave in a hospital, where his medical attendance and nursing has cost \$300; and he continues to be expensive without being in any manner useful or profitable, as the disease is incurable. He prays that the defendant be required to take back said slave, and return the price, together with \$600 for medical attendance, &c.

The defendant pleaded a general denial. Upon these pleadings and issues the case was tried.

The evidence of two physicians showed that when they were called in, the slave Titus was afflicted with a disease of the bladder, kidneys, and weakness in the loins and general debility, which they pronounced a chronic disease of the kidneys. Doctor Osborne declares, that on the day and year, to wit: the 6th April, 1835, the negro man Titus was afflicted with a serious disease of the kidneys. It was a bad case, but witness cannot say it was incurable. The disease at the time mentioned appeared to have been of long standing. It appeared he became helpless soon after the sale and delivery to the plaintiff's agent.

The defendant's witnesses deposed that the slave was healthy, active and athletic up to the time of sale; and that they discovered no symptoms of disease. His general good health and robust, athletic constitution was proved by two overseers and two other persons who had charge of him, and some of them up to the time of sale; in other words he was proved to be perfectly sound, in good health, up to the day of sale. No

evidence of a tender of the slave to the defendant was produced. There was, however, a verdict and judgment annulling the sale and decreeing the return of the note or price of the slave. The defendant appealed.

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BULLARD.

T. H. Lewis, for the plaintiff and appellee, submitted the case. The defendant in person, presented written points on which he relied for the reversal of the judgment.

Martin, J. delivered the opinion of the court.

The defendant is appellant from a judgment by which the plaintiff has recovered the price of a slave which he bought of the defendant, on the ground of a redhibitory malady, called "a chronic disease of the kidneys."

A new trial was refused to the defendant and he appealed.

The evidence is so completely poised, that if the verdict of the jury had been against the plaintiff we should not have felt authorized to relieve him; as, it appears to us, he made that *hardly probable*, which it was his duty to make certain.

The new trial was in our opinion incorrectly refused: but the defendant and appellant has not sought relief from us on that score. He has urged, that although there is an allegation, *there is no evidence* in the record, to show that the plaintiff offered to return or give back the slave, and that the judgment makes no provision for his return; and that such an offer must always precede the institution of a suit, or action for the return of the price, in a sale sought to be annulled and set aside on account of a redhibitory defect in the object sold. Such was the decision of this court in the case of *Janin vs. Franklin*, 4 La. Reports, 198; which is supported by the case of *Castellano vs. Peillon*, 2 Martin, N. S., 466, in which case a runaway slave was excepted from the general rule; *Exceptis probat regulam*.

Where the plaintiff makes that *hardly probable*, which he was bound to make certain, and there is a verdict against him, he is not entitled to be relieved; but if the verdict is against the defendant in such a case, a new trial ought to be granted.

In a redhibitory action for the rescission of the sale of a slave, a tender or offer to return the slave must be proved, at the trial, to have been made before suit.

It is therefore ordered adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed;

WESTERN INS. and that ours be for the defendant and appellant, as in case of
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 a non-suit, with costs in both courts.

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 ET AL., f. p. c.
 vs,
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 HEIRS ET AL.

EDWARDS ET AL., f. p. c., vs. MARTIN'S HEIRS ET AL.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, FOR THE PARISH OF
 LAFAYETTE, THE JUDGE OF THE SIXTH PRESIDING.

The Roman law, in laying down a general rule on the subject of warranty, provides, that the purchaser must be indemnified to the *extent of the interest* he had in not being evicted: on this there are some restrictions.

In regard to agreements, having for their object certain quantity or amount, as in sales, leases, &c., the damages were not to exceed the value of the subject matter of the contract.

A debtor, engaging to pay damages for the non-performance of his obligation, is presumed to intend only the highest damages, within the contemplation of the parties at the time of the contract; and if they are such as could not have been foreseen, they must be reduced to a reasonable sum.

Principles of the Roman law, which never had the force of positive law in this country; but which are founded in equity and reason, will be adopted as rules, regulating the indemnity, to which a party is liable, on his warranty. So it is improbable, that parties ever contemplated, that the damages in case of eviction should be larger, than the value of the subject matter of the contract.

So where the vendee of a female slave, purchased in 1802, was evicted, and the vendor refunded the price; is afterwards evicted of *her increase or children*, the vendor is only to pay as damages, the value or original price of said slave, and not the value of the young slaves, born of her after the sale, although much greater.

This is an action for personal liberty and freedom. The plaintiffs are colored persons, and children of a colored woman named Polly Edwards, who was sold as a slave the 24th April, 1802, by Joseph Andrus, residing in the county of Opelousas, to André Martin, the ancestor of defendants, for \$625. The

plaintiffs were all born after this sale, and while their mother was held as a slave by Martin. He afterwards sold her to one Joseph Foreman, against whom she asserted her freedom, alleging she was free born. She had judgment in December, 1834, declaring her free, and that she was born free. Foreman had judgment over against Martin on his warranty for \$665, who had a like judgment against Andrus, and who had also judgment against the widow and heirs of Edwards King, from whom he had purchased. Andrus paid to Martin the amount of the judgment, on the eviction of Foreman.

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Martin being now sued by the children of Polly Edwards, who claimed their freedom in right of their mother, who was a free woman from her birth, called Andrus, in warranty as the vendor of the mother, and prayed judgment over against him in case of eviction. The warrantor admitted the original sale and the eviction and freedom of the mother, but denied, that he was liable in warranty for the price or value of the children, born after the sale. He also called in the heirs of Edwards King, from whom he had originally purchased, to warrant and defend him against the demand of Martin, his vendee.

Upon these pleadings and issues the cause was tried before the court and a jury.

The record and evidence of the case of Polly Edwards against Foreman was produced, which showed, that the mother of the plaintiffs was a free woman from her birth, and that consequently they were born free, although at the time their mother was held as a slave. There was a verdict and judgment, declaring *them free*: assessing their value as slaves at the time to be \$4,900, for which the heirs of André Martin, deceased, were entitled to recover from Joseph Andrus, on his warranty as vendor of their mother. Andrus was declared entitled to recover the same sum from King's heirs. From judgment rendered on this verdict, Andrus's executor (he being now dead) appealed.

This cause was twice elaborately argued by *Mr. Simon*, for Martin's heirs, and by *Thos. H. Lewis, & B. C. Crow, Esqrs.*,

WESTERN DIS. for the appellant, Andrus, called in warranty. It was taken
 September, 1841. under advisement, and again argued, and was again submitted

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to the court on the following written points and authorities.

Voorhies, acting for Judge *Simon*, on behalf of Martin's heirs, maintained the following points.

1. The only question arising in this case is relative to the extent of the warranty, due to the heirs of Martin by the succession of Joseph Andrus, deceased. The heirs of Martin have been evicted of the mother of the slaves, plaintiffs in this cause. Said plaintiffs have received their freedom, in consequence of their mother having succeeded in showing, that she was born free, and of their being entitled to follow the condition of their mother. Polly Edwards was sold by Andrus to Martin in 1802, and then she had no child; her children, plaintiffs in this cause, were born after the purchase. The heirs of Martin contend, that having been evicted of the female slave, sold, and of her issue, the succession of Andrus is bound to return them not only the original price of the purchase, but also to compensate them for *all the losses and damages* resulting from the said eviction; that is to say, the value of the children of the slave purchased.

2. Were this case to be governed by the laws actually in force in this State, the question presented would be easily decided. Our code has specially provided for a case like the present one; C. Code, arts. 537, 2482, 2488; 9 La. Rep., 552. Said laws would certainly sustain the defendants in their pretensions.

But the question is to be decided by the laws in force in this country in 1802. How far do said laws agree with those now in force? Can it not be said, that the articles of our Code were taken from the old laws of the country, which are derived, with regard to the question now before this court, from the Roman laws? Under the Spanish laws, the vendor is bound, in case of eviction, to return the price, and to pay all the losses and damages sustained by the vendee: "Con todos

los daños e los menoscabos que le vinieron por esta razon ;" *WESTERN DIS. September, 1841.*
 Partida 5, tit. 5, L. 32 and 36. The same principle is laid down in C. de evictione, L. 17; C. cum questio, &c., &c.

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Under the Roman law, the children of a female slave, born after their mother was put in pledge, remain liable to the pledge like the mother; C. lib. 8, tit. 25, L. 1. And why are those children liable to the pledge? Because they are considered as the fruits of the thing pledged.

3. In case of a sale, the warranty need not be special; C. lib. 8, tit. 45, L. 6, p. 422.

Whether the slave recovers his liberty, or in case of warranty, if the purchaser's title be in any way attacked, the purchaser must be restored what the president of the province or the judge may consider as due. And what must he consider, in order to form his decision? The damages and losses experienced, "los daños e los menoscabos." C. lib. 8, tit. 45, L. 12, p. 424; Ibid. L. 21, p. 426; Ibid. L. 25, p. 427.

What is, under the Roman laws, the mode of estimating damages in case of eviction? C. lib. 8, tit. 45, L. 23, p. 427.

When the female slave is dead, the judge must pronounce, by reason of the fruits, concerning the children. D. lib. 6, tit. 1, L. 16; Ibid. L. 17, No. 1, p. 450.

In actions of revendication, what things are considered as fruits? Ibid. L. 64, p. 464.

Children are not considered as fruits in case of usufruct. D. lib. 7, tit. 1, L. 68, p. 505. This rule is also contained in the law now in force in Louisiana, and is undoubtedly an exception to the general rule concerning fruits.

In actions of restitution, fruits and the children of female slaves are included. D. lib. 12, tit. 6, L. 65, No. 5, Vol. 2, p. 249.

4. A purchaser evicted is to be reimbursed, as it respects every interest which he had: *Evicta re, ex empto actio non ad pretium duntaxat recipiendum, sed ad id quod interest competit.* D. lib. 21, tit. 2, L. 70, Vol. 3, p. 218. In this case, are not the heirs of Martin interested particularly in not being

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evicted of the children of the female slave sold, or, in other words, are not said children the greatest interest they have in the consequences of the eviction of the mother? Most undoubtedly; and if so, my clients are entitled to be indemnified for the value thereof.

Fruits comprehend all losses. D. lib. 22, tit. 1, L. 19; Ibid. L. 34; Ibid. L. 38, Nos. 5 and 8.

Increase of slaves ranked with fruit. D. lib. 41, tit. 3, L. 4, No. 5.

5. Here follows the very case before the court. D. lib. 21, tit. 2, L. 8. *Venditor hominis emptori præstare debet quanti ejus interest hominem venditoris fuisse.* This is the principle, on which the jurisconsult Julien bases his opinion, that: *Sicut obligatus est venditor, ut præstet licere habere hominem quem vendidit, ita ea quoque quæ per eum adquiri potuerunt, præstare debet emptori ut habeat*, and applying this principle to a case like the present one, he draws the conclusion, that the purchaser of a female slave, who suffers the eviction of her child, born in his possession, has his recourse against his vendor, to be indemnified. It is true, that the adverse counsel has quoted the opinion of Paul, in the same book, tit. 2, L. 42, which appears to contradict Julien. Why should this opinion be considered of more weight than Julien's, particularly when we find, that the same jurisconsult Paul, in the L. 70, of the same book and title, establishes the very same principle, and agrees perfectly with Julien on the general rule? He rather appears inconsistent with himself, when he contradicts the opinion of Julien in the very first application of the principle to a case, which presents the same facts. The decision of Paul, on the application, is, in my humble opinion, erroneous, and contrary to the true principles of equity and justice. It would be an exception to a general rule adopted by himself: this exception would be mischievous in its consequences, as it would limit the right of warranty to the reimbursement of the price, were Paul's doctrine to be sanctioned. On the contrary, the opinion of Julien appears to me to be the best; it is concordant with

our old Spanish laws ; it agrees with the principles recognized repeatedly by the decisions of this tribunal, under both our codes, and it is undoubtedly founded on real principles of equity and justice. I sincerely hope, that Julien's doctrine will be adopted by this Honorable Court, and will receive its application in the present case ; and were it to be so, it seems to me, that the law, under which this question is to be decided, will have been enforced according to its true meaning and letter, and my clients will then have been indemnified for todos los daños e menoscabos, which they have experienced from the eviction.

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Thomas H. Lewis for Andrus called in warranty, contended,

1. The contract out of which this controversy has grown, having been executed in 1802, while Louisiana was a province of Spain, the rights of the parties should be settled by the laws in force at that time.

2. By these laws, the vendor was liable, in case of eviction of his vendee, of the thing sold, to restore, 1st, the price paid, and 2d, damages when any were sustained by the eviction of the thing sold—*propter rem ipsam*. Partida 5, Tit. 5 Ley 32 and 36, and of his opinion was Pothier, as to the laws of France in his time, which laws, like those of Spain, were chiefly derived from the Roman Civil Law. See Contract de Vente, Nos. 130, 131, 136, 145.

3. The obligation of warranty, like all others, cannot reasonably be construed to extend farther than the terms of the contract, shown to have been intended and contemplated by the parties at the time they contracted ; and it cannot be supposed that he who sells a thing for \$625 contemplates the payment to his vendee, in case of eviction of a sum of \$4800,00 over and above the price he received. This is a principle founded both in reason and in law ; Pothier Con. de Vente, Nos. 136, 137.

4. The last position is so manifestly equitable that it was settled by the Roman law that damages in cases of eviction

WESTERN DIS. could never extend further than the restitution of double the price ; and for the settlement of the rights of parties in such cases two actions were established, to wit :

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The *actio ex empto* and the *actio de evictione*, by the latter of which the person evicted was entitled to recover from his vendor double the price he paid, and by the former, the price and damages, but in this case the damages could never exceed the double of the price, though they might be less.

See the doctrine on this subject fully treated in Pothier's Pandectes, Lib. 19, Tit. 1, and Lib. 21, Tit. 2, where many cases are put, and it seems to me, this distinction runs through all of them. Not having the work at hand, I cannot give the particular references, but refer to the passages beginning, "*In hac actione*," &c. and "*Hoc tamen duas limitationes*," &c. and request the honorable court to consult that very learned work.

5. By the Roman law, if a female slave be sold while pregnant and the vendee be evicted of the child after its birth, the vendor was not responsible in warranty, *a fortione*; he should not be responsible for the children not conceived until long after the sale. Dig. Lib. 21, Tit. 2, L. 42 and 43.

6. The children of slaves were not considered fruits by the Roman law; Dig. Lib. 22, Tit. 1, L. 28, § 1. L. 27. ff. *de hered. petit.*, as held by Ulpian; Dig. Lib. 5, Tit. 3, L. 27. But I contend that the vendees in this case had no right to recover fruits, but only such damages as they may prove they have sustained by the eviction of *the thing* sold to them, and that these damages must be confined to a *real loss* sustained by the loss of the thing sold, and not computed on a disappointment of the hope of gain.

Children follow the condition of their mothers, and if the mother be free, the children cannot be slaves; so in this case, Polly Edwards having been always free *de jure*, her children were born free; never were the property of the heirs of Martin, and never could have been the objects of a legal contract of sale; and consequently could not have been warranted. So that Martin's heirs never had any title to them beyond a

naked possession which they obtained not by virtue of any written deed, but simply from the fact of their having been born of a woman they held in bondage.

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On the equitable merits of the cause, it is abundantly proven, in the record, that Martin's heirs, so far from having suffered any loss or damages, by the purchase of Polly Edwards in 1802, have actually derived a much greater profit than is the usual result of such a transaction; for they have enjoyed the services of Polly for over twenty years, until her physical strength is wasted, and her value reduced to \$150; and have since received back the price they paid for her. They have also enjoyed the services of her four children for many years, which services are proven to have been worth, before the eviction, some four or five thousand dollars.

It is true, he who sells property with warranty of title, ought to be bound, by the terms of his obligation, to make good any loss his vendee may sustain by his want of title in what he sells, but where there is good faith, as in the present case, it seems to me that sound principles of equity and justice should place some limits on the extent of such obligation; otherwise cases may arise where the sale of a piece of property of trifling value may lead to the utter ruin of an innocent vendor.

Morphy, J. delivered the opinion of the court.

The mother of the plaintiffs, Polly Edwards, a free born woman of color, was sold as a slave for life in 1802, by Joseph Andrus to André Martin, for the sum of \$625. She was then about nineteen years of age, and had no children. In 1829 she claimed and recovered her freedom against one Joseph Foreman, to whom she had been conveyed by André Martin. In that suit Andrus was decreed, as warrantor, to return to the heirs of Martin the money paid for the pretended slave, together with the costs; the question of damages having been expressly reserved in case the children of this woman, born since the purchase, should thereafter recover their freedom. The pre-

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sent suit having been brought by them to be declared free, the vendor of their mother was again cited in warranty by the defendant. The cause was tried before a jury who gave their verdict for the plaintiffs; and at the same time assessed the damages due to the defendants at \$4800. Judgment having been entered up in conformity with this finding of the jury, the executors of Andrus appealed.

The only question in this case is as to the extent of the damages due to the heirs of the vendee under the clause of warranty. The sale having taken place in 1802, the rights and obligations of the parties to it must be settled according to the laws in force at that time. Under the laws of Spain, the vendor was bound in case of eviction to reimburse the price of the thing sold, and to pay all the losses and damages sustained by the vendee "*con todos los daños e menoscabos que le vinieron por esta razon ;*" Part. 5, T. 5, L. 32. But to what did these damages extend? Were they without any limit whatever, even with regard to a vendor in good faith? And did they embrace the increased value of the thing sold, however enormous, and from whatever cause it arose? On these questions, the Spanish writers we have been able to consult, throw little light; but Gregorio Lopez, in his notes on the above law, points to the Roman Digest, as the source from which it had been drawn, and both the counsel have also referred to it. On the part of the appellant, it is contended that the children of slaves were not considered as fruits by the Roman law, and that a vendor was not responsible in warranty for the eviction of the child of a female slave sold while she was pregnant; Dig. Lib. 22, T. 1, L. 28; and Dig. Lib. 21, T. 2, L. 42. The latter law reads thus: "*Si pręgnans ancilla vendita et tradita sit, evicto partu, venditor non potest de evictione conveniri, qua partus venditus non est:*" *à fortiori*, it is said, a vendor should not be responsible for children not conceived until long after the sale. On the other hand, the counsel for the appellee relies on the 8th law in the same book and title, as establishing a different doctrine: "*Venditor hominis emp-*

tori præstare debet, quanti ejus interest hominem venditoris fuisse ; quare sive partus ancillæ, sive hereditas quam servus jussu emptoris a dierit, evicta fuerit, agi exempto potest ; et sicut obligatus est venditor ut præstet licere habere hominem quem vendidit, ita ea quoque quæ per eum adquiri potuerunt, præstare debet emptori ut habeat." The apparent contradiction between these two texts is owing entirely to the difference of the actions alluded to in them. The Roman law gave to the purchaser two remedies, the *actio ex empto*, and the *actio de evictione*. The latter which was used to enforce the *stipulatio dupla*, was subject to strict and technical rules. It could not be resorted to unless the purchaser had been evicted of the subject matter of the sale itself, while in all cases the *actio ex empto* could be brought to recover any damages sustained *prætor pretium*, whether the eviction was of the thing sold itself, or of any thing proceeding from it : vide Pothier's Pandects, vol. 8, p. 134 ; Dumoulin, Tract. de eo quod interest, No. 148. The general rule on the subject of warranty in the Roman Digest, is to be found in the 60th law of the same book and title. It provides that the purchaser must be indemnified to the extent of the interest he had in not being evicted, and this is the first law referred to by Gregorio Lopez, in his note on the word *menoscabos*. But this rule was subject in the Roman law to the limitation laid down in laws 43 and 44 of T. 1, Book 19, which are also cited by the learned commentator. Paulus says, "Planè, si in tantum pretium excedisse proponas, ut non sit cogitatum à venditore de tanta summa ; veluti si ponas agitatore postea factum, vel pantomimum, evictum esse eum qui minimo venit pretio, iniquum videtur in magnam quam sitatem obligari venditorem ;" "cùm et fortè idem mediocrium facultatum sit, et non ultrà duplum periculum subire eum oportet." Dumoulin, while he approves of this equitable restriction of the warranty in relation to the expenses of the purchaser in the law just quoted, remarks that it should with more reason be adopted with regard to any great or accidental increase of the thing sold. "Igitur multo magis idem dicendum

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The Roman law, in laying down a general rule on the subject of warranty, provides, that the purchaser must be indemnified to the extent of the interest he had in not being evicted : on this there are some restrictions.

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In regard to agreements, having for their object certain quantity or amount, as in sales, leases, &c., the damages were not to exceed the value of the subject matter of the contract.

A debtor, engaging to pay damages for the non-performance of his obligation, is presumed to intend only the highest damages, within the contemplation of the parties at the time of the contract; and if they are such as could not have been foreseen, they must be reduced to a reasonable sum.

de augmento vel accessione casuali, quæ venit sine sumptu emptoris, ut fecunditas et partus ancillæ emptæ, hereditas servo empto relicta et per eum acquisita;" idem tract. No. 138. To put an end to all doubts and disputes on this subject, Justinian in his law *de sententiis quæ pro eo quod interest proferuntur*, ordered that in all cases where the agreement had for its object a certain quantity or amount as in sales, leases, &c., the damages to be assessed should not exceed the value of the subject matter of the contract: Code, Book 7, T. 47, L. 1; but the vendor in good faith was alone entitled to the benefit of this restriction. From the above references of Gregorio Lopez, we cannot but believe that the principle of warranty was adopted and applied in Spain with the just and reasonable limitation which attached to it in the Roman jurisprudence. In commenting on this constitution of Justinian, Pothier says, that it rests upon the principle that the objections which flow from contracts can result only from the will and consent of the parties; that a debtor by engaging to pay damages for the non-performance of this obligation is presumed to have intended to be bound only for the highest damages that could be within his contemplation at the time of the contract, so that when they are such that they could not have been thought of or foreseen, they must be reduced to a sum which it was reasonable to expect they might reach; Pothier's Oblig. No. 164; Dumoulin Nos. 60, 137, 138, 139, and 148.

In the present case, it is unreasonable to suppose that Andrus, when in 1802, he sold Polly Edwards for \$625, and gave his warranty, contemplated the payment to his vendee, in case of eviction, of a sum of \$4800, as damages, over and above the price he should be decreed to reimburse. The circumstance of this woman refraining during 27 years from the exercise of her right to claim her freedom, and having, after this lapse of time six children and grand-children, (and she might have had a much greater number) forms certainly an event which cannot be reasonably supposed to have been thought of or contemplated by the vendor in 1802. It brings this case with-

in the exception which exempts the vendor in good faith from the ruinous obligation of paying the whole of the increased value of the thing sold ; Pothier vente, Nos. 136 and 137. This edict of Justinian, never had the force of positive law in this country, but the principle upon which it is founded is so consonant to equity and reason, that we feel bound to follow it and give as an indemnity an amount equal to the value of the thing sold, to wit : \$625.

As remarks the judicious and learned Dumoulin, it is improbable that the parties ever contemplated that the damages in case of eviction, should be larger than the value of the subject matter of the contract, " quia verisimiliter non fuit prævisum nec cogitatum de suscipiendo majori damno vel periculo, ultra rem principalem, quàm sit res ipsa principalis ;" Nos. 57 and 60, Idem Tract. This indemnity appears to us fair and even liberal, when it is considered that the vendees have been reimbursed the whole amount of the money paid for Polly Edwards in 1802. After they had enjoyed her services during 27 years, nearly the whole of the ordinary time of service of a slave, they were perhaps entitled to recover only a portion of the price for the probable remainder of the lifetime, because in the sale of a slave the warranty of the vendor does not contemplate the perpetual enjoyment of the thing sold as in the case of a tract of land ; but only such a temporary enjoyment as a slave is susceptible of by the laws of nature : Pothier vente No. 163 ; Dig. Lib. 19, T. 1, Law 45 ; Dumoulin, Nos. 127 and 128.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be so amended as to allow to the defendants against the estate of the late Joseph Andrus, instead of \$4800, the sum of \$625 with costs below ; those of this appeal to be borne by the appellees.

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Principles of the Roman law, which never had the force of positive law in this country ; but which are founded in equity and reason, will be adopted as rules, regulating the indemnity, to which a party is liable, on his warranty.

So it is improbable, that parties ever contemplated, that the damages in case of eviction should be larger than the value of the subject matter of the contract.

So where the vendee of a female slave, purchased in 1802, was evicted and the vendor refunded the price ; is afterwards evicted of her increase or children, the vendor is only to pay as damages, the value or original price of said slave, and not the value of the young slaves, born of her after the sale, although much greater.

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R. McCARTY
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J. P. McCARTY.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, FOR THE PARISH OF ST.

MARY, THE JUDGE OF THE SIXTH PRESIDING.

A continuance will not be allowed, when due diligence has not been used to obtain the testimony of witnesses, alleged to be material.

Motions and affidavits for continuances are addressed to the legal discretion of the court, and should be granted or denied, so as to effect the speedy termination of suits as far as is consistent with justice.

This suit commenced by attachment of a judgment in favor of the defendant, against the plaintiff, for \$3,175 rendered on a note of hand.

The plaintiff alleges that the defendant is a resident of Tennessee, and is indebted to him in the sum of \$1500, the value of a slave named William, taken by the latter to Tennessee and never returned; also \$600 for payments and offsets which should have been allowed as credits on the note, on which judgment was rendered, but were not; and likewise \$200 per annum for the services of said slave until he be restored and delivered up. He prays for judgment accordingly, and that an attachment issue and be levied on defendant's judgment against him.

The defendant averred the plaintiff could not maintain his action, for the claims and demands now set up should have been pleaded in the suit which this defendant instituted against him, the judgment whereof is now attempted to be attached; that these claims existed when that suit was commenced and should have been set up as a defence; which not having been done, these matters have become *res judicata*; and he is now barred from claiming them in this action.

In answer to the merits the defendant pleads the general issue; and avers that the note on which judgment was rendered, was given in full settlement of all the accounts and claims between them for which a suit was then pending, and afterwards dismissed. That the facts and allegations set forth in the petition are unfounded and untrue.

Upon these pleadings and issues the cause was tried.

This suit was instituted the 19th July, 1837, and the answer to the merits filed April 8, 1839.

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On the trial, April 10, 1840, the plaintiff filed his affidavit for a continuance, in order to obtain the testimony of witnesses in Tennessee, which was refused; the judge being of opinion the grounds were insufficient. A bill of exceptions was taken to the opinion of the court. The affidavit is fully stated in the opinion of this court.

There was judgment for the defendant and the plaintiff appealed.

Splane, for plaintiff and appellant.

Maskell & T. H. Lewis, for defendant and appellee.

Garland, J. delivered the opinion of the court.

This suit was commenced by an attachment, which was levied on a judgment which the defendant had previously obtained against the plaintiff. The petition was filed the 19th of July, 1837. On the 8th of October following, the defendant appeared by his counsel and filed various exceptions, which were overruled and the defendant ordered to answer. On the 8th of April, 1839, the defendant filed his answer and the cause was continued with leave to both parties to take testimony out of the state. The cause was called for trial on the 17th of April, 1840, when the plaintiff applied for a continuance, on the ground that the testimony of Daniel Carmichael and Absalom M'Carty, of Hawkins county, Tennessee, was material and important for him, and from the statement in the affidavit, of what the witnesses are expected to prove, there is no doubt of the materiality of the evidence. The defendant objected to the continuance on the grounds, that Carmichael would not swear to what the plaintiff alleged and that due diligence had not been used to procure his testimony. To establish the fact that Carmichael would not swear to all the plaintiff alleged the defendant produced his deposition, which he

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had had taken under a commission issued in this case and also offered it to show that proper diligence had not been used to procure his testimony. The defendant says that previous to sending his commission and interrogatories to take the testimony of Carmichael and others, he had a copy of them served on the counsel for plaintiff, who did not annex any cross-interrogatories, whereby the testimony of Carmichael could have been obtained. In reply to this the counsel for the plaintiff says, the service of the interrogatories on him was insufficient. This question it is not necessary to decide at present, but the fact of the deposition being taken may be considered in connection with the question of diligence, and raises a violent presumption, that the plaintiff might have obtained the deposition of Carmichael as easily as the defendant did.

The affidavit of the plaintiff in relation to the facts to show proper diligence is not very definite; in some respects it is unintelligible. He says he has sent a commission to take testimony of his witness, but when, or what diligence he has used to procure its return he does not inform us. It does not appear he has ever written or made any inquiry, why the commission has not been returned, or given himself any trouble about it. To procure the testimony of A. M'Carty, the other witness no commission is pretended to have been sent. To excuse himself for not using more diligence, the plaintiff says that in the autumn of 1839, a severe epidemic prevailed in Franklin, that one of his counsel died and the other was sick, that two clerks of the court died in September or October, and the office was sometime vacant, also that he went frequently to the court house to get his counsel to draw interrogatories, but he was absent and it could not be done.

It has been stated that this suit was commenced in July, 1837, the exceptions filed by defendant was overruled in October and a judgment by default entered. There was then a legal issue made and the plaintiff knew what he had to prove. He permitted the case to lie over until April, 1839, when an answer was filed; he then knew what he had to combat. It

A continuance will not be allowed when due diligence has not been used to obtain the testimony of witnesses alleged to be material.

may be proper to inquire what the plaintiff was doing from early in April until sometime in September? Both his counsel were then alive and well, as was the clerk of the court, and no epidemic was prevailing. What was he doing from October until the April following? His counsel had recovered his health and was not we presume always absent; the office of clerk had been filled and no obstacle is known to have prevented a commission being taken out to procure the desired testimony. From the institution of the suit to the trial was nearly three years, during two and a half of which the plaintiff might have taken testimony. He attaches a judgment rendered against him individually, for claims alleged to be existing previous to its rendition, and manifests but little anxiety to prosecute his suit after he had arrested the collection of the defendants demand against himself.

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Motions for a continuance are always addressed to the legal discretion of the court that tries the cause and ought to be granted or denied, so as to effect as speedy a termination of cases as possible, consistent with justice. It is as important that diligence in obtaining testimony be shown as that the evidence be material. In this case we think sufficient diligence has not been shown and the judge did not err in refusing the continuance.

Motions and affidavits for continuances are addressed to the legal discretion of the court, and should be granted or denied, so as to effect the speedy termination of suits as far as is consistent with justice.

The judgment of the District Court is therefore affirmed with costs.

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R. M'CARTY
vs.
J. P. M'CARTY.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT FOR THE PARISH OF ST. MARY,

THE JUDGE OF THE SIXTH PRESIDING.

Where seizure is made and notice given on the 21st June, and the advertisement is dated the 24th of the same month, it will be considered as one day too early. Three days should intervene between the notice of seizure and the advertisement.

A sale of real property cannot be legally made by a sheriff until the 34th day after the seizure. But if this time is given, it cannot be objected that the advertisement was posted up a day or two sooner than was required.

A clerical error in the description of a piece of land in the sheriff's advertisement, not calculated to mislead the party interested, is immaterial.

Interest on the dissolution of injunctions cannot exceed ten per cent; if the judgment enjoined bears ten per cent. interest, all above that sum which is allowed must be in the way of damages if the injunction is dissolved.

This suit commenced by injunction. J. P. M'Carty having obtained a judgment on a promissory note of the plaintiff for \$3175, with ten per cent. interest, issued execution and was proceeding to sell a tract of land, when stopped by injunction. The plaintiff alleges that when suit was pending in which said judgment was rendered, he pleaded several matters and demands in reconvention which were rejected, and for which he has instituted a separate suit, against the said defendant, and attached the judgment in question. He further alleges that notwithstanding this, execution issued and has been levied on a tract of land, situated on the east side of Bayou Teche, but the sheriff has advertised a tract of land situated on the west side of said bayou for sale. He prays for injunction to stay all further proceedings in said sale and that he have judgment perpetuating the same with costs.

The defendant set out various grounds for the dissolution of the injunction, and prayed that it be dissolved with damages and costs.

On hearing the parties, and examining the papers and documents relative to the seizure and advertisements, there was

judgment dissolving the injunction with ten per cent. interest, and five per cent. damages and costs; and that the sheriff proceed with the sale as if no injunction had issued.

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vs.
J. P. M'CARTY.

The plaintiff appealed.

Splane, for the plaintiff and appellant.

Maskell & T. H. Lewis, for the defendant.

Garland, J. delivered the opinion of the court.

The plaintiff has obtained an injunction in this case to arrest the execution of a judgment which the defendant had obtained against him for \$3175, with ten per cent. interest and costs, alleging that the defendant was indebted to him (the plaintiff) in a sum nearly sufficient to extinguish the said judgment. That he had commenced a suit by attachment which had been levied on said judgment, notwithstanding which the defendant was going on to execute the same, and had actually had an execution issued and levied on a tract of land situated on the *east* side of the bayou Têche, in the parish of St. Mary, belonging to him (plaintiff) and was proceeding to have the same sold by the sheriff. He says if the sheriff is permitted to proceed to collect the money on said execution, he will lose the benefit of his attachment; and he further alleges that the sheriff in his proceedings had acted illegally, in this, that he advertised for sale the property seized, before the expiration of the three days notice of seizure required to be given by articles 654 and 655 of the Code of Practice; also that in the advertisement he had described the tract of land seized as situated on the *west* bank of the bayou Têche, when in the seizure and notice thereof, it is described as being on the *east* bank.

The defendant presents many grounds of defence, which it is not material now to notice; there was a judgment dissolving the injunction and the plaintiff appealed.

The first ground of complaint is disposed of by the decision rendered by the court below in the attachment case, which we have affirmed; *ante*, 296.

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Where seizure is made and notice given on the 21st June, and the advertisement is dated the 24th of the same month, it will be considered as one day too early. Three days should intervene between the notice of seizure and the advertisement.

A sale of real property cannot be legally made by a sheriff until the 34th day after the seizure. But if this time is given, it cannot be objected that the advertisement was posted up a day or two sooner than was required.

The second objection is, that three days did not elapse between the service of the notice of seizure and the posting up of the advertisement. The article 654 of the Code of Practice requires this notice, and the articles 655 and 667 say three days are to elapse previous to advertising. The seizure was made and notice given on the 21st of June, 1837, the advertisement is dated the 24th of the same month, and the sale to take place on the 31st day of July. We think the advertisement was made one day too early. Three days should intervene between the notice of seizure and the advertisement; C. Pr., articles 180, 318; in all cases where the sale is to take place precisely thirty days from the day of advertising; or in other words a sale of real property cannot be legally made by a sheriff until the thirty-fourth day after the seizure. If this time is given we do not think it a fatal objection that the advertisement was posted up a day or more too early. The object of the law is to give the debtor three entire days to pay the debt, if he wishes to do so. If on the last day of grace he pays the debt, and the sheriff has in the meantime advertised the property seized, the debtor would not be liable for the cost of the advertisement, because he had a time fixed within which he might pay; but if he does not pay, we are unable to see what injury or injustice can be done by advertising the sale the longest time possible. The decisions of this court in 14 La. Rep., 84, and 6 Idem, 23, are based upon an entire want of notice of the seizure previous to advertising, and can easily be distinguished from this. In the present case forty days were to elapse from the time of seizure to that of sale, which gives ample time for the advertisement to have effect after the expiration of the three days allowed for notice.

The third objection, is that in the advertisement, the land seized is said to be on the *west* bank of the bayou Têche, whilst in the seizure and notice, and in fact, it is on the *east* bank. The boundaries, quantity and description in every particular are similar in the notice of seizure and advertisement

except in the instance mentioned. It is not alleged or in evidence that the plaintiff had any land on the west bank of the bayou; he knew very well what property was seized; if the sheriff had have been permitted to go on with the sale, it is more than probable he would have referred the appraisers to the seizure he had made than to the advertisement, for a description of the property, and if he had not, the plaintiff had the necessary information to correct him. We look upon it as an error *currante calamo*, entirely insufficient to sustain the injunction. If any injury was likely to result from it, the plaintiff might have opposed it as an objection whenever a monition should be applied for. The description of the property is so ample in all other respects, as to make it certain notwithstanding this error; if it had been carried out in the sheriff's sale and return on the execution, and it had been shown the plaintiff had land and a crop on the west bank of the bayou, the mistake might be considered more serious in its consequences.

The appellant further contends there is error in the judgment dissolving the injunction in allowing the defendant ten per cent. interest on the amount of the original judgment, besides damages at the rate of five per cent. on the amount. In this, we think the judge erred. The original judgment bears interest at the rate of ten per cent. per annum from the time it became due until paid. When this is the case, we are of opinion a proper construction of the act of 1831, p. 102, sec. 3, does not authorize the annual interest to be increased beyond ten per cent., whatever else that may be allowed must be in the way of damages. But as the court below, very probably fixed the damages at five per cent. in consequence of giving interest at ten per cent. per annum, we think the judgment in relation to interest and damages should be amended.

It is therefore ordered and decreed that the judgment of the District Court be affirmed so far as it dissolves the injunction, and reversed so far as it allows ten per centum interest on the amount of the judgment, and five per cent. damages, and pro-

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A clerical error in the description of a piece of land in the sheriff's advertisement, not calculated to mislead the party interested is immaterial.

Interest on the dissolution of injunctions cannot exceed ten per cent.; if the judgment enjoined bears ten per cent. interest, all above that sum which is allowed must be in the way of damages, if the injunction is dissolved.

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HEIRS
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M'DERMOTT.

ceeding to give such judgment as, in our opinion, ought to have been rendered by the court below, it is ordered and decreed the defendant James P. M'Carty, recover of the plaintiff, Robert M'Carty, damages at the rate of ten per cent. on the judgment for \$3175, with the interest due thereon, on the 26th day of July, in the year 1837, the day the injunction issued ; the costs in the District Court to be paid by the plaintiff and appellant, and those of this court to be paid by the defendant and appellee.

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APPEAL FROM THE COURT OF THE FIFTH DISTRICT, FOR THE PARISH OF
LAFAYETTE, THE JUDGE OF THE SEVENTH PRESIDING.

Admitting the plaintiffs are owners of the upper end of a larger tract of land, yet if they show no location by an authorized survey, embracing the *locus in quo*, they cannot maintain an action, even of trespass, against a possessor, so as to oust or disturb him.

This is a suit in the nature of an action of trespass, in which the plaintiffs claim damages against the defendant for entering upon their land of which they claim to be in possession. They pray that he be condemned to remove his fences and improvements of every kind from their land and pay for the damage he has already caused them.

The defendant pleaded the general issue. It appears from the pleadings and evidence that the plaintiffs claim to be the owners of the upper part or one undivided half of a larger

tract, confirmed to one Fletcher, and to be located in a particular manner.

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The plaintiffs' portion calls to bound on the upper side by lands owned by Josine Le Blanc and below by those of White. No location was ever made of the plaintiffs' part by any authorized surveyor; and nothing shows that the defendant's improvements are embraced by or included in the plaintiffs' claim. They had judgment however quieting them in their possession and title to the land in dispute, and for five dollars in damages. The defendant appealed.

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Voorhies, for the plaintiffs.

Crow & Wm. B. Lewis, for the defendants.

Martin, J. delivered the opinion of the court.

The plaintiffs state that the defendant has entered on their premises and committed waste, and erected buildings and fences on a tract of land of which they are in possession as owners; having inherited the same from Thomas Hornsby, deceased. They pray that the defendant be decreed to remove his buildings and fences from their land, and to pay them one thousand dollars in damages; and for general relief.

The general issue is pleaded. The plaintiffs had judgment for the land, and five dollars in damages; and the defendant appealed.

The plaintiffs claim through several mesne conveyances from Thomas Fletcher, the original grantee, who obtained from the land commissioners of the United States, a certificate of confirmation of an inchoate right acquired under the Spanish government in consequence of a settlement and cultivation, to a tract of land containing 640 acres, situated in the county of Attakapas on the left or east side of the bayou Vermillion, fronting on said bayou, and to be laid out 40 arpents in depth, giving so much front on the right line as will give the quantity above expressed. The right of Fletcher to this

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land was acquired by Peyton Bland from the administrator of the former, sold by order of the Court of Probates. Bland's title passed to Alexander Porter under a sheriff's sale, in which the land sold is thus described: "a certain parcel of land situated on the east side of the river Vermillion, bounded above by lands of Josine Le Blanc and below by lands of Wm. White, consisting of 640 superficial arpents." Porter sold to Theall and described the land as "one undivided half of a certain tract or parcel of land, situated in the parish of Lafayette and lying on the east side of the river Vermillion, consisting of 640 superficial arpents." John B. Theall sold to Thomas Hornsby, the ancestor of the plaintiffs, on the 18th of February, 1832, one undivided half of this land, describing it in his deed of sale, to be "the undivided upper half of 640 acres of land, lying and being, in the parish of Lafayette, on the east bank of the river Vermillion, and part of the same tract originally confirmed to Thomas Fletcher by the commissioner's certificate, &c., in conformity with a re-survey made by Wm. Jackson, deputy surveyor, the 6th February, 1832, &c.; said land bounded above by Veuve Josine Le Blanc and below by the lower half of said section, belonging to Lloyd Wilcoxon." The survey of Jackson is expressly made a part of Theall's deed, to which it is annexed, but is not to be found in the records of the present suit. There is no evidence of any location ever being made of the original tract. It was to contain 640 acres, equal to 756 27-100 arpents and the depth is expressly stated in the certificate to be 40 arpents; consequently the front line on the Vermillion river should be nearly 19 arpents. The location of this tract was to be made so as to include the improvements of Fletcher, the original grantee. All the mesne conveyances state that the location was to be made on a larger tract fronting on the river, but bounded above by the lands of Josine Le Blanc and below by those of Wm. White.

Admitting the plaintiffs are owners of the land. Admitting what the record leaves doubtful, that the plaintiffs have shown themselves to be the owners of the upper half of

the tract, yet they have shown no location under the authority of the United States, which would embrace the *locus in quo*. WESTERN Dag.
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If the tract confirmed to Fletcher be located according to its description, with such a part as multiplied by forty would give the superficies of 640 acres and embracing the improvements made by Fletcher, it is clear it would not extend so high up as to cover the place occupied by the defendant. It is true the mesne conveyances speak of Josine Le Blanc's line as the upper boundary, and that may be conclusive between the vendor and vendee, but so far as a stranger is concerned, the premat-
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ture title or a public survey, duly approved, must be looked into in order to ascertain the true location of the land. Nor do the plaintiffs show possession under his deed, so as to authorize them to maintain this action, which appears to us to be strictly neither petitory nor possessory, but in the nature of an action of trespass *quare clausum fregit*. upper end of a
larger tract of
land, yet if they
show no loca-
tion by an au-
thorized sur-
vey, embracing
the *locus in quo*,
they cannot
maintain an ac-
tion, even of
trespass, against
a possessor, so
as to oust or
disturb him.

The judgment of the District Court is therefore annulled and reversed, and judgment of non-suit entered against the plaintiffs with costs in both courts.

WALKER vs. ALLEN ET AL.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT FOR THE PARISH OF ST.

MARY, THE JUDGE OF THE DISTRICT PRESIDING.

Where a party shows a judgment, execution, sheriff's return thereon, and deed of sale, it is *prima facie* evidence of a valid alienation; and the party attacking the sale must show the forms of law have not been fulfilled.

If a purchaser at sheriff's sale does not offer good security, the sheriff must sell again immediately. If he gives any delay, it is at his own risk, and he will be liable in damages to the plaintiff in execution, if any are sustained in consequence of such delay.

19L 307
49 586

WESTERN DIS.
September, 1841.

WALKER
vs.
ALLEN ET AL.

This is an action against the purchaser at sheriff's sale, of a tract of land; and the sheriff who made it, to annul and set it aside, on account of the illegal acts of the sheriff and the want of the formalities required by law, to render it a valid sale.—The plaintiff claims heavy damages against the sheriff for the alleged illegal sale of his land, and prays that the sale be set aside, and the land restored to him.

The defendants severed in their answers; but both averred that the sale was fairly made, and all the formalities required by law complied with. They deny any collusion or unfair conduct, and expressly aver that the sale is valid and good, and that the defendant, Allen, be quieted in his possession and title to the same. The sheriff declares that he has no interest in the matter except to see his sale, as sheriff, maintained. He prays that the suit be dismissed, as to him.

On the evidence produced, and arguments of counsel, the cause was submitted to a jury who returned a verdict for the defendants, acquitting the sheriff of any blame whatever in making said sale. There was judgment in favor of the defendants; and after an unsuccessful attempt to obtain a new trial, the plaintiff appealed.

Splane, for the plaintiff.

T. H. Lewis & Maskell, for the defendants.

Garland, J. delivered the opinion of the court.

The plaintiff alleges he is the owner and proprietor of an undivided half of a tract of land of twenty-eight arpents front, by forty in depth, on the Bayou Boeuf, in the Parish of St. Mary, and fourteen slaves, together with the buildings and improvements on the land; which he says the defendant, Allen, claims and possesses as his property. He also claims \$15,000 damages from Hudson, for his illegal and improper conduct and acts, as sheriff, in selling said land and slaves. The answers of the defendants deny all allegations of im-

proper or illegal conduct, and state that Allen purchased the property at a sale made by the sheriff of St. Mary, under an execution issuing out of the District Court in New Orleans, in favor of Thomas Barrett *vs.* Walker.

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September, 1841.

WALKER.
vs.
ALLEN ET AL.

The case depends entirely upon the acts of the sheriff under this execution, and we have scrutinized them closely, without being able to detect any error in them.

It is well settled that a judgment, sheriff's deed, and return upon the execution, furnish *prima facie* evidence of a valid alienation, and he who attacks it must show the forms of law have not been complied with; 8 *La. Rep.* 422; 3 *Idem* 476; 5 *Idem* 486; 9 *Idem* 542; 16 *Idem* 454, 547.—In this case a regular judgment, execution and sheriff's deed have been produced, and it therefore devolves on the plaintiff to show the other legal formalities have not been fulfilled. This he has undertaken to do, with what success will be seen, when each objection is examined.

Where a party shows a judgment, execution, sheriff's return thereon, and deed of sale, it is *prima facie* evidence of a valid alienation; and the party attacking the sale must show the forms of law have not been fulfilled.

It is first alledged the plaintiff had himself become the purchaser of the property in question, at a sale made by the sheriff on the same day the defendant purchased it. It appears, the plaintiff had specially authorized one William Bigler, who owned the other half of the land and slaves, to purchase in the property seized, and sign a twelve months bond. Accordingly, Bigler bid off the property in the name of plaintiff, and offered himself as security on the twelve months bond; the sheriff declined accepting him, on the ground he was not sufficient, and no other security being offered who was present to sign the bond, the sheriff again set up the property, when it was adjudicated to the defendant, who gave bond and security as required by law. The plaintiff says, that after Bigler was rejected as insufficient, other security could have been given, if the sheriff had have given sufficient time to have procured it, and he offers to prove by one Daniel Morrison, that if he had been applied to, he would have signed the bond, but he never had been requested to do so.

The defendant objected to the examination of this witness,

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and the court sustained the objection, to which the plaintiff excepted. We do not deem it necessary to decide upon this bill of exception, because if the testimony were before us, it would not produce any change in our opinion, on the question. The witness had never been asked to become security, it is not shown he was at the time in the neighborhood, though he lived a short distance from the place; and Bigler does not seem to have asked for definite time to obtain the security, besides all this, testimony of what a man might have done two years previous, if he had been asked, is not of much weight.—He might not have entertained the same opinion in relation to the matter at the two periods. But the duties of sheriffs in this respect are well known, and have long since been promulgated by this court. In the case of *Dufau et al. vs. Massicott et al.*; 3 Martin, 294; it was held, where property was struck off to a bidder who failed to comply with the terms of the sale, the sheriff is not bound to grant any delay, but may sell again immediately. In 8 Martin, 220; a similar doctrine was established. In 3 La. Rep. 475; it is said, if a purchaser at a sheriffs' sale does not offer good security, the sheriff must sell again immediately. See also 4 La. Rep. 396; as establishing the same principle. If a sheriff gives any delay in a case of this kind, he does so at his own risk, and would be liable in damages if the plaintiff in the execution sustained any by it. The plaintiff contends that Bigler was sufficient security, because, the property seized was sufficient to pay the debt. The sheriff, when interrogated on oath, says he thought him insufficient, and a witness testifies to the same fact; it further appears all his property was mortgaged for the purchase money.

The plaintiff alleges the execution was improperly issued, as an appeal had been taken from the judgment on which it issued. By referring to the order granting the appeal, it appears the execution issued three months before, and it is expressly stated not to be suspensive in its character. This objection is therefore unavailing.

If a purchaser at sheriff's sale does not offer good security, the sheriff must sell again immediately. If he gives any delay, it is at his own risk, and he will be liable in damages to the plaintiff in execution, if any are sustained in consequence of such delay.

The next objection is that the advertisements were not legal. It is in evidence that the advertisements were posted up at the court-house the legal number of days; they were published in a newspaper printed in the town of Franklin, every week, up to the sale. It is further shown that the church in that town is private property, the pastor has expressly forbidden the posting of advertisements on it, and he testifies that seeing an advertisement (as he believes in the case of *Barrett vs. Walker*,) stuck up there, he tore it down, considering it disrespectful to his congregation. We are unable to detect any error in the conduct of the sheriff in this particular.

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WALKER
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The fourth objection is, that the notice of seizure was not legally served on plaintiff. It appears the plaintiff is a resident of Mississippi; he and Bigler were the owners of the plantation and slaves seized, they were in partnership in the plantation, saw-mill, and a contract in relation to live oak timber. Bigler, by the terms of the partnership, was the managing partner, and as to that, the agent of plaintiff. The notice of seizure was left with him, at the usual place of residence, and a power of attorney from plaintiff to Bigler, is in evidence authorizing him to act as agent at the final sale. This we think, a sufficient service of the notice of seizure, but if it were not, we think the plaintiff has waived any objections to it, by appearing himself at one time when a sale was to take place, and making no objections to the sheriff proceeding, and again appearing by his agent and bidding for the property. The notice is in the record and is very specific and full.

The fifth objection is, that the sheriff made the sale although he was directed by the attorneys of the plaintiff in execution, to postpone it indefinitely. The facts are, the sheriff received the execution from a gentleman of the bar, who gave him written directions how to proceed, and signed himself as attorney for Barrett. Under this order the sheriff seized, advertised the property for cash, there being no bidders at that sale, he advertised it to be sold on twelve months credit.

WESTERN DTS. When he went to the place to make this sale, a letter was
September, 1841. received from other attorneys, of whom he had no knowledge,
 previously directing him to postpone the sale. This embar-
 rassed him considerably, but Walker being then present,
 consented to a postponement for nearly a month, in the mean-
 time, the last mentioned attorneys countermanded their order
 for a postponement, and directed the sheriff to proceed and
 sell the property, which he did. There is nothing erroneous
 in this respect.

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- The other objections taken in the argument by the counsel for plaintiff, are so nearly similar to those considered and decided, in the case of *M'Carty vs. M'Carty*, that it is only necessary to refer to that case to decide them; see this case *ante* 390.

In conclusion, we have to remark, that we have never seen a case, in which a sheriff has complied more completely with the law in discharging his duty, and if the plaintiff has suffered by it, he cannot blame the officer who was charged with the execution.

The judgment of the District Court is therefore affirmed with costs.

OF THE STATE OF LOUISIANA.

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SMITH vs. BROWNSON.

Western Dis.
September, 1857.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, FOR THE PARISH OF
ST. MARY, THE JUDGE OF THE SIXTH PRESIDING.

SMITH
vs.
BROWNSON.

Where a judgment, which is enjoined already, bears interest at ten per cent. per annum, no further interest can be allowed on a dissolution of the injunction.

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Interest on the dissolution of an injunction may be increased to ten per cent.; but whatever else, that may be allowed against the plaintiff and his surety in injunction, should be given as damages.

This suit is in the nature of an action of nullity and injunction, to render a certain judgment, made definitive against the present plaintiff, null; and in the meantime to enjoin all proceedings under it. The plaintiff shows, that he purchased a certain tract of land at sheriff's sale, against which there existed a judicial mortgage, and that the defendant, to whom the judgment and judicial mortgage has been transferred, has sued out an order of seizure and sale, and is proceeding to sell the property. He alleges, that said judgment is null and void, and that the order of seizure and sale, issuing in virtue of the mortgage purporting to result from it, issued improperly. Wherefore he prays for an injunction to stop the seizure, and that the said judgment be annulled and cancelled with damages.

To this petition the defendant avers, he voluntarily appears and answers; denying generally all the allegations in the petition; expressly averring, said judgment was obtained fairly and honestly, and that it has acquired the force and effect of *res judicata*. There are many other matters and things set out in detail and at great length in the answer, which concludes with a prayer, that the plaintiff's demand be rejected; that the injunction be dissolved with damages, interest and costs on the amount enjoined; and that the order of seizure and sale be allowed to proceed as if no injunction had been obtained.

One of the grounds of nullity of the judgment enjoined, relied on, was the improper practices of the defendant and his counsel in taking away certain important papers, which had

WESTERN DIS. been produced in evidence on the trial, and filed. The plaintiff alleges, he lost his remedy by an appeal in consequence of this illegal conduct.

SMITH
vs.
BROWNSON.

There was a mass of testimony offered on the trial; and the whole case, on the evidence, explanations of counsel, and a charge from the court, was submitted to a jury, who returned a verdict in favor of the defendant, that the injunction be dissolved with ten per cent. interest, and five per cent. damages. From judgment confirming this verdict, and dissolving the injunction as having been wrongfully obtained, with ten per cent. interest on \$1962 83, from the 5th April, 1839, when the injunction was obtained, until its dissolution; and five per cent. damages on the same sum; and that the order of seizure proceeded, as if no injunction had issued: the plaintiff appealed.

Dwight, for the plaintiff and appellant, *insisted*, that the injunction should be maintained, as it was shown, one of the judicial mortgages, on which the judgment enjoined had been obtained, was in fact never legally recorded, and did not import a mortgage; and also for the improper practices of the defendant's counsel, in taking away papers, and preventing his appeal.

2. Ten per cent. interest and damages were improperly allowed on the dissolution of the injunction. The judgment must therefore be reversed.

Maskell, contra.

Garland, J. delivered the opinion of the court.

From the allegations in the petition in this case, it would appear, the object of the petitioner is to obtain the nullity of a judgment, which the defendant had previously obtained against him, for alleged ill practices on the part of the counsel of defendant in the trial of the case, and the illegal acts of the judge during the trial; but when we look to the conclusion, we find no prayer for annulling the judgment, but only for an injunction and damages. The answer as well as the petition is of

great length, and puts at issue the various allegations, and among other matters alleges, that the most material matters and things, upon which the injunction was claimed, existed previous to the suit of defendant against plaintiff, and were at issue in that case, or should have been pleaded in it; and as the plaintiff failed to set them up, it is not a ground for injunction; he also puts in the plea of *res judicata*. The defendant further says, if there is any thing else not covered by his former pleas, the plaintiff might have been relieved by an appeal in the suit of Brownson vs. Smith, which he has never prosecuted.

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September, 1841.

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VS.
BROWNSON.

It appears, that the suit of defendant against plaintiff, was for the purpose of enforcing two judicial mortgages, which affected a tract of land purchased by the latter, who was a purchaser in good faith, without notice. On the trial of the cause, the plaintiff (now defendant) offered in evidence what purported to be a copy of one of the judgments, and a certificate of its being recorded. The defendant's (now plaintiff's) counsel objected to the introduction of this document in evidence, on the ground, that the allegation in the petition was, that the judgment allowed interest on \$521, from a certain date, and the copy produced said \$571. The record book from the recorder's office was then brought into court, which showed the judgment had been originally recorded as for \$571; the original judgment was then referred to, and it was found to be \$521, as set forth in the petition. The clerk of the recorder of mortgages, who had inscribed the judgment, being then in court with the record book, stated, that it was a clerical error committed by himself, in using the word *seventy* for *twenty*, the former word being used in another part of the judgment; whereupon the counsel for plaintiff (now defendant) moved the court to permit the clerk to correct the error in the book and copy, so as to make them conform to the original judgment, which the judge permitted, and then received the document in evidence. This alteration took place in open court in the presence of the judge and parties, the counsel for the defendant

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BROWN & CO.

(now plaintiff) objecting and saying, he would take a bill of exceptions, which it was agreed he should write out and present to the judge for his signature, before he left the judicial district, in which he was then presiding. The trial proceeded, and the judgment now enjoined was rendered. As soon as the trial was over and judgment rendered, the counsel for plaintiff (now defendant) took into possession the copy of the judgment offered in evidence, and some other documents, on which they relied in the trial, and kept them, alleging they had not been *filed*, and they were entitled to them, in consequence of which the plaintiff now alleges, his counsel could not draw up the bill of exception he intended to take. It does not appear, at what time the counsel for plaintiff applied to the opposing counsel for the documents, so as to draw his bill of exception, but it appears, he did not submit his bill to them until some months after, when the judge had left the district; the counsel for the present defendant then declined consenting to its being signed, saying their consent did not extend so far, and the counsel for the present plaintiff insisting, that it ought to be signed, as he had been prevented from making it out by their detention of the papers; the consequence was, no exception was taken or appeal asked for, so far as the record shows—and the plaintiff (now defendant) proceeded to execute his judgment, when this injunction was issued.

It is not necessary to go into a further examination of the difference of opinion between the counsel as to the right to take papers into possession, and we dismiss it with the remark, that as a general rule documents used in evidence ought not to be withdrawn, without the consent of the opposing counsel or the court, although the word *filed* may not be endorsed on them.

If the conduct of the judge was illegal in permitting the alteration of the record book, and the copy produced as evidence, which we do not decide on, we are satisfied it was nothing more than a legal error, without the slightest improper motive on his part. The alteration being made by permission

of the court, and in presence of all the parties, shows there was no such fraud or ill practices on the part of the party or his counsel as would annul the judgment according to article 607 of the Code of Practice. Had the defendant, in the judgment enjoined, taken an appeal, and brought his case before us in such a manner as to have had the question examined by us, or have enabled us to have had the whole matter brought up, a serious question might have arisen, whether the judgment which was altered, was properly recorded previous to that alteration, so as to have effect against third persons; but as he has not done so, we do not think there is sufficient ground to maintain the injunction.

The counsel for the plaintiff says, that he could not have brought up an appeal in the case of Brownson vs. Smith in such a way, as to have presented the questions at issue, in consequence of the counsel for Brownson withdrawing the documents offered in evidence. We think he could. If the papers were improperly or illegally withheld, he had only to move for a rule on the counsel to show cause, why they should not file them in court, and it would have been ordered, if necessary. If that mode had not been effectual, we could, if the case had been brought before us, and we were convinced, that injustice had been done, have remanded the cause for a new trial.

The counsel for plaintiff contends, the judgment of the inferior court must be reversed, as the judgment dissolving the injunction allows ten per cent. interest per annum on the whole amount of the judgment, enjoined from the day of issuing to its dissolution, whereas the judgment already bore ten per cent. interest per annum. We have already said in several cases during this term, that where a judgment enjoined bears interest at ten per cent. per annum, we will not increase it; but whatever else may be allowed against the plaintiff and his surety, should be given as damages. Vide *McCarty vs. McCarty*, ante 300. Where judgments do not bear ten per cent. per annum interest, then perhaps the interest may be increased to that rate, if dissolved, from the date the injunction issued, until payment.

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September, 1841.

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Where a judgment which is enjoined already, bears interest at ten per cent. per annum, no further interest can be allowed on a dissolution of the injunction.

Interest on the dissolution of an injunction may be increased to 10 per cent.; but whatever else that may be allowed against the plaintiff and his surety in injunction, should be given as damages.

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The judgment of the District Court is therefore annulled, avoided and reversed so far as it condemns John Smith, the plaintiff, and Daniel P. Sparks, his surety, to pay interest at the rate of ten per cent. per annum on the sum of nineteen hundred and sixty-two dollars, and eighty-three cents, from the 5th day of April, 1839, until the dissolution of the injunction, and in all other respects affirmed—the plaintiff paying the costs in the District Court; those of the appeal to be paid by the defendant and appellee.



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**PLICQUE & LEBEAU vs. PERRET—Françoise Pain
Intervenor.**

APPEAL FROM THE COURT OF THE FIFTH DISTRICT FOR THE PARISH OF
ST. MARY, THE JUDGE OF THE SIXTH PRESIDING.

Where notes are given in renewal of those sued on, although such renewal as between the parties may not operate a novation, so as to affect the mortgage by which ultimate payment is secured, yet the plaintiffs cannot recover without producing or satisfactorily accounting for the notes given in renewal.

In judgments of the Supreme Court, the reasoning is less to be regarded, than the final conclusion announced; so when the decree is positive, without any reservation, it is *res judicata* as to all the matters in dispute.

No matter in what form of action or proceeding, whether by petition, exception or intervention, the question may have been presented, if the same question once judicially decided between the parties, be again agitated, it is sufficient to create the presumption resulting from the *thing adjudged*, and forms a complete bar.

This is an action on several notes executed to the plaintiffs in liquidation of a large account for advances, supplies and purchases of slaves for Ursin Perret, the defendant. The

plaintiffs allege there is a balance due them of \$55,333, for which they pray judgment.

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They further allege that the defendant executed a mortgage by act under private signature, the 5th April, 1831, on a plantation and a large number of slaves, situated in the Parish of St. Mary, to secure the payment of the original debt of \$80,000. That this debt was reduced to the sum of \$55,333 with ten per cent. interest, from the 31st March, 1834: That some of the negroes thus mortgaged were sold, by which the debt was reduced to this sum. The petitioners pray that the property mortgaged be sold to satisfy their mortgage. The suit is instituted on the original notes, although it appears there were renewals of them and payments made.

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The defendant pleaded a general denial. He set up several matters in defence, and prayed that the plaintiffs' demand be rejected, and that the said act purporting to be a mortgage be annulled and cancelled.

The wife of defendant, Françoise Pain, now intervened; averred she was separated in property from her husband, and claimed all the property described in the instrument or act of mortgage, under private signature, as her separate property; she opposed the claim of the plaintiffs so far as they seek to set up the mortgage against her rights and interests; or in so far as they seek to make the property alleged to be mortgaged, liable for their claim against her husband. She also pleads a former judgment in her favor, and against the plaintiffs, as *res judicata* in this case.

The plaintiffs replied to the petition of intervention, and plead a general denial. They specially deny the exception of *res judicata*; and contend that she is bound by her act of renunciation, (act annulled; see 10 La. Rep., 304.) They pray that her demand be rejected, and that she be declared bound with her said husband in said act.

The defendant pleaded the prescription of 5 years against the notes, &c.

The whole case under these pleadings and issues was

WESTERN DIS. submitted to a jury, who returned a verdict in favor of the
September, 1841. plaintiffs for \$55,333, with ten per cent. interest, against the

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defendant, Perret, and in favor of the intervenor against the plaintiffs. There was judgment confirming this verdict; and cancelling the act of mortgage so far as the intervenor, Françoise Pain is concerned, and that she be quieted in the possession of the property, &c., which is declared free of the plaintiffs' claim, &c. The plaintiffs appealed.

Mazureau, for the plaintiffs and appellant.

Crow, for the defendant, Perret.

T. H. Lewis, for the intervenor, Madame Fr. Perret.

Ballard, J. delivered the opinion of the court.

The plaintiffs sue to recover of U. Perret, the sum of fifty-five thousand three hundred and thirty-three dollars, being a balance due on sundry promissory notes amounting originally to the sum of \$80,000, but reduced by payments to the amount claimed, secured by mortgage on a plantation and a large number of slaves, bearing date the fifth day of April, 1831, as evidenced by an act under private signature of that date. They pray judgment against him for that balance, with interest at ten per cent., and that the mortgaged premises be seized and sold to satisfy the same.

The original defendant denied his indebtedness, averred that he had been induced to execute the notes and act of mortgage by false and fraudulent representations of the plaintiffs that he was indebted to them in that amount, when as in fact he did not owe them one-half of the amount. That the whole of the act is false, fraudulent and void. He further avers that the plaintiffs have received from him two crops of sugar amounting to twenty thousand dollars, which added to the price of a large number of the slaves mortgaged, which have since been sold and the price paid over to the plaintiffs, makes about seventy thousand dollars received by them, which is more than he owed. He alleges that the rest of the property has been

sold under execution and has gone out of his possession; and he prays that the act may be declared null and the plaintiff's suit be dismissed.

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The wife of the defendant, who is separated in property from him, intervened in the suit and represents in her petition that the act of mortgage set up by the plaintiffs as one under private signature, is the same which was attacked by her in her suit against the present plaintiffs in the same court, numbered 1584, and which in that suit the plaintiffs alleged was sufficient in law to bind the intervenor, and that the same was an authentic act of mortgage. That final judgment was rendered in that case in her favor and against the said Plicque & Lebeau, ordering and decreeing, among other things, that the said act be forever cancelled, quashed and set aside, so far as she was concerned. That the said Plicque & Lebeau prosecuted an appeal from said judgment, but that the same was affirmed in the Supreme Court. She further represents that in the same suit she set up, among other things, that she had instituted a suit in the same court claiming a separation of property from her husband, and claimed as her separate property all the slaves then in her husband's possession, which she had acquired by inheritance from her father and mother; that she further claimed against her husband a large sum of money due her, together with the right of mortgage upon all the property in possession of her husband, and in preference to any right of Plicque & Lebeau, the plaintiffs, and she prayed in that suit that they might be cited as parties to make opposition if they thought proper. That they did appear and contest her right of mortgage and also to her own slaves, and her right to obtain any judgment against her husband, and that all the matters and things thus set up and contested were finally decided by the said court against the present plaintiffs, and the judgment afterwards affirmed by the Supreme Court, so that all the said matters and things have acquired the force and effect of the thing adjudged, and she formally interposes the exception *res judicata*. She proceeds to allege that notwithstanding the

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opposition of creditors she recovered a final judgment against her husband, which was also finally affirmed by the Supreme Court.

The plaintiffs answered the petition of intervention by a general denial, and they specially deny the authority of the thing adjudged, and allege that she is bound by the act of renunciation, of which a copy is annexed to the plaintiff's petition. They conclude by praying that she may be adjudged to be bound by her said renunciation and that her mortgage may be postponed to that of the plaintiffs.

Upon the issues thus made up between all the parties judgment was pronounced by the District Court against the husband for the balance of \$55,333, with interest at ten per cent., and in favor of the wife, sustaining her exception *res judicata*. The original plaintiffs, Plicque & Lebeau, appealed, and Ursin Perret alleges in his answer in this court there is error to his prejudice and that the judgment below ought to have been in his favor.

The case therefore presents in this court questions quite distinct as it relates to the two parties defendant and intervenor in the court below; and we proceed to examine it first as it concerns the husband, Ursin Perret; and secondly as to the wife:

I. As against the husband, the plaintiffs claim a judgment for a large balance on fourteen notes signed by him, and which were given in evidence on the trial, being of even date with the act of mortgage, purporting to have been passed before a notary.

It appears that previously to the trial the plaintiffs were ordered "to produce their mercantile books which exhibit all the transactions between them and the defendant, between 1829 and 1837, to be used on the trial." Some books were accordingly brought forward, but as appears by the affidavit of one of the plaintiffs, the books produced do not contain and show all the transactions between the plaintiffs and the defendant, but that they have other books not called for and which contain and show said transactions. It does not appear very

clearly whether the books not produced relate to transactions previously to 1829 or subsequently. Extracts from the books produced on the trial were read in evidence by both parties. Various entries were extracted and come up with the record, from which it appears that most of the notes drawn by Ursin Perret and endorsed by Pajot Perret, dated April, 1831, and payable in all March, 1832, had been renewed and other notes given in place of them, payable the following year. The notes thus given in renewal are neither produced nor accounted for. Although the renewal as between the parties may not operate novation so as to affect the mortgage by which the ultimate payment is secured, yet we are of opinion that the plaintiffs cannot recover without the production of or satisfactorily accounting for the notes given in renewal. In relation to some of the notes it appears from the books that more than one renewal has taken place. The same original debt may subsist so far as the parties are concerned, but the new note is the best evidence of what really remains due. If not produced the judgment pronounced in the present case would not be a bar to a future action upon them. But in point of fact as it relates to some of the notes now sued on, it appears from the books that they were paid. It may be said that the plaintiffs have given credit for what has been paid, and now claim only a part of the original amount. To that it may be answered, that such a mode of proceeding leaves the defendant completely at the mercy of the plaintiffs, and without the means of verifying whether all his payments have been credited.

Under this view of the case, the judgment, so far as the defendant, Ursin Perret, is concerned, must be reversed and the case remanded.

II. The case of Madame Perret, which we now proceed to examine, presents the question whether the exception *dicata* was properly sustained by the court below; and if not, whether her renunciation in the act now treated as one private signature be valid and binding upon her.

It is proper first to notice an objection made by the counsel

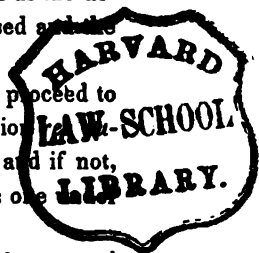
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Where notes are given in renewal of those sued on, altho' such renewal as between the parties may not operate a novation, so as to affect the mortgage by which ultimate payment is secured, yet the plaintiffs cannot recover without producing or satisfactorily accounting for the notes given in renewal.



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LEBEAU
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for the plaintiffs, which relates to the construction of the judgment pronounced by this court in the first case, as reported in the 10th volume of the Louisiana Reports, 804. It is contended by him that the court reserved the question as to the legality and validity of the wife's renunciation, and pronounced only upon the character of the act by which it was evidenced; declaring it to be not an authentic act, and not proved as one under private signature by the production of the original. He maintains that the convention or contract may well exist in full force although the instrument by which it is evidenced may be null as a notarial instrument; and that the obligation would survive even the destruction of all evidence of it; and that the Supreme Court did not decide on the validity of the agreement by which Madame Perret renounced her legal mortgage in favor of the plaintiffs, but merely that the act was not valid as an authentic one, because not executed in presence of two witnesses. The counsel refers to the following expressions used in the opinion of the court, to show that the question of right and obligation was reserved: "We have not examined whether this act may be opposed to her as an act *sous seing privé*, because it was not urged."

In judgments of the Supreme Court, the reasoning is less to be regarded, than the final conclusion announced; so when the decree is positive, without any reservation, it is *res judicata* as to all the matters in dispute.

Expressions such as that above quoted, cannot be properly regarded as controlling the formal judgments pronounced by this court. The reasoning of the court is less to be regarded than the final conclusion announced; we are to enquire rather, what was *dane*, than what was *said*, especially in an isolated sentence which, when taken in connection with the context, may have quite a different meaning. It is true, this court apparently looked more to the form of the act, than to its substance, perhaps upon the commonly received opinion, that the authentic form of the act in such a case was of the essence of every renunciation on the part of a married woman. After expressing the opinion therefore, that the act, being proved not to be authentic, could not be opposed to her, and that the record showed the plaintiff's, that is Madame Perret's claim against her husband, and her legal mortgage on the premises,

according to the prayer of the petition, the court might well regard that as not existing, which was not shown to exist, and remark, that we had not considered it our duty to examine a question, which the parties had not raised, to wit : what would be the result, if the act had been insisted on as one under private signature. The court proceeded to affirm the judgment of the district court in all its parts. If it had been the intention of this court to reserve the question now presented, the judgment below would have been modified, as is our uniform practice. But such was not the case, and we are bound to consider the judgment of the district court, as forming that of this tribunal, just as much as if it had been copied into our formal decree, affirming that of the court below.

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We proceed then to enquire, what was litigated and adjudicated in that case, and whether the same matters and questions are again agitated in this, between the same parties? If so, the court below did not err in sustaining the exception, and if not, the question still remains open in this case, whether the appellee, Madame Perret, has validly postponed her mortgage to that of the appellants.

The judgment pronounced in the case of Madame Perret vs. Plicque & Lebeau, which was affirmed by this court, was "that the plaintiff's renunciation contained in the act of mortgage described in her petition, be rescinded and annulled, and that the said act, together with the order of seizure and sale and other proceedings had upon the same, be forever cancelled, quashed and set aside so far, as the plaintiff is concerned in the same; and that the injunction sued out in this case be made perpetual," &c. The petition in that case alleged, "that the obligations pretended to be stipulated in that act, and the renunciation therein made, are so far as she is concerned, null and void: 1st, because she never knowingly consented to the same; 2d, because her signature to the act was obtained by fraud, surprise and deception, &c.; 3d, because the said obligations and renunciations, although they should appear to have been consented to by her, are in themselves, so far as they are

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calculated to prejudice her rights, null and void, inasmuch as the said obligations and renunciations are intended to have the effect of making your petitioner contract as the security of her husband, which is not permitted to be done either directly or indirectly." "She therefore prays, its nullity may be declared by the court." In the answer to the petition of injunction, Plicque & Lebeau aver, that the act, on which the order of seizure and sale had been obtained, "is sufficient in law to bind the parties thereto;—that the said act ought to have its full effect, and the plaintiff bound by the stipulations and renunciations contained in the said act," &c.

Thus we see, that on the part of Plicque & Lebeau the validity and binding force of the contract and renunciations of Madame Perret are asserted, and on her part their nullity is averred not only on the ground of a want of consent voluntarily given with a full knowledge of her rights, but because the principal obligation therein contracted, and the renunciation are prohibited by law, inasmuch as she thereby becomes the security of her husband for a debt of his contracting.

Let us next enquire, what are the questions, which the pleadings in the present case present for adjudication, and whether they be identical with those already settled by the first judgment.

Plicque & Lebeau bring their action against the husband upon the same notes, secured by the same mortgage, which they sought to enforce by the order of seizure and sale in the former case. The same instrument, which was in that case pronounced not authentic, is now insisted upon as an act under private signature. The wife intervened as above stated, urging, that so far as it concerns her and her title to the property, brought into marriage and purchased under her judgment of separation, her renunciation had been declared null and void, and the judgment pronounced in the suit against her husband contradictorily with the plaintiffs, and in that case forms the authority of the thing adjudged between the parties. This is denied in the answer of Plicque & Lebeau, who further allege,

that the intervenor is bound by her act of renunciation, and they pray, that she may be so declared, and that the mortgage by her claimed may be postponed to that of the plaintiffs.

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Of the four requisites to constitute the authority of the thing adjudged, to wit: identity of the thing demanded, identity of the cause of action, identity of parties, and of the capacities in which they act, no doubt can exist in this case, except as to the two first.

The object or thing must be the same. What are we to understand by the object or thing? "Il faut," says Touillier, "suivant les jurisconsultes Romains, que ce soit le même corps, la même quantité, s'il s'agit de choses corporelles; le même droit, s'il s'agit de choses incorporelles;" "idem corpus, quantitas eadem, idem jus." X. Toul. 144.

The right in controversy in the first case, which was claimed by Plicque & Lebeau, and denied by Madame Perret, was that of seizing and selling certain lands and slaves, to pay their debt in preference to the wife under her mortgage or claim. That right of preference, it was asserted, was conferred by an agreement on the part of Madame Perret, entered into before a notary and two witnesses, which was binding upon her. This was denied by her, and the nullity, not only of the act as one purporting to be authentic, but that of the *contract or convention* itself, which it evidences, as prohibited by law, was insisted upon by her. This convention or agreement formed the cause of action, *causa petendi*. "Il ne faut pas confondre la cause de la demande avec les moyens de la prouver. Cette confusion serait une grande erreur. Que faut-il donc entendre par la cause de la demande, *causa petendi*? Car le mot est un peu vague. Il importe beaucoup d'en déterminer le sens précis. C'est, dit Neratius, la cause prochaine de l'action—*causa proxima actionis*,—et non pas l'espèce ou le genre d'action qu'un plaideur choisit pour demander en justice la chose qu'il réclame: car deux actions différentes peuvent avoir la même cause: la même cause peut produire plusieurs actions. Si la chose demandée est la même, la seconde action quoique

WESTERN DIS. *différente de la première, doit donc être repoussée par l'exception de la chose jugée.*" X. Toullier. No. 161.
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In the first case, the creditors Plicque & Lebeau adopted the summary proceedings by order of seizure and sale, alleging that their act of mortgage imported a judgment confessed;—in the present case, they resort to the ordinary action, and if no other question had been decided but the authenticity of the act purporting to have been passed before De Armas, no doubt can exist as to the right of the plaintiffs, to change their form of action.

But in the first suit Madame Perret interposed by way of injunction, insisting that her rights could not be affected by a contract not only null in its form but its substance, as above stated. In the present case, she comes forward in a different form, by intervention, and presents the same question, and by answer to her intervention the plaintiffs again insist upon the validity of the contract of Madame Perret and of her renunciation of the laws in her favor, even considered as evidenced by act under private signature. But no matter in what form

No matter in what form of action or proceeding, whether by petition, exception or intervention, the question may have been presented, if the same question, once judicially decided between the parties, be again agitated, it is sufficient to create the presumption resulting from the thing adjudged, and forms a complete bar. "Exceptio rei judicatæ obstat, quoties inter easdem personas, eadem quæstio revocatur, vel alio genere judicii." The able argument of the counsel for the appellant, which has been ably answered, has failed to convince us, that the question touching the obligatory force of the contract on the part of Madame Perret, and the validity of her renunciation, is still open. On the contrary, we are of opinion, that the court below did not err in sustaining the exception.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court, so far as it relates to Françoise Pain, wife of Ursin Perret, be affirmed with costs, and so far as concerns the said Ursin Perret, that it be annulled and re-

versed, and that the case be remanded for a new trial as to him, **WESTERN DIS.**
and that the costs of the appeal be borne by the plaintiffs and *September, 1841.*
appellants.

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vs.
MASSE'S
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FUSELIER'S HEIRS, f. p. c. vs. MASSE'S HEIRS, f. p. c.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, FOR THE PARISH OF
ST. LANDRY, THE JUDGE OF THE SEVENTH PRESIDING.

Property received as a donation from the Spanish government by one of the spouses does not enter into the community; but remains his separate property and descends to his heirs as such.

The rights of the original parties to this suit were determined by this court in a former appeal. See the case of Fuselier, f. m. c., vs. Masse et al., f. p. c., 4 La. Rep., 423.

By the decree of this court the plaintiff was entitled to take one-half of the community property of which Magdalaine Masse, f. m. c., died possessed, and the defendants the other half; and the case was remanded in order that a partition be made accordingly.

The whole matter having been referred to the parish judge to make the partition, he completed the same and returned his report into court.

The defendants made opposition on the ground that the report and partition gave to the plaintiffs *more than one-half of the property to be divided.*

The contest turns on the question whether two tracts of land in Prairie Bass, and which sold for \$2670, were community property, or the separate property of Etienne Sam Fuselier?

WESTERN DIS. If the latter, the plaintiffs were entitled to the whole, as they
September, 1841. inherited all of his estate, through their father, whom he
 adopted.

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The district judge from the evidence produced, decided that these two tracts of land belonged to the community, and on bringing their proceeds into the mass with all the other property an equal division was decreed between the parties. The plaintiffs appealed.

Gibbon, for the plaintiffs and appellants.

Crow & T. H. Lewis, for the defendants.

Martin, J. delivered the opinion of the court.

The plaintiffs are appellants from a judgment, which directs the division of two tracts of land, granted by the Spanish government to Etienne Sam Fuselier, f. m. c., as part of the community between him and his wife. This case was before us at September term, 1832, (4 La. Reports, 423,) when we decreed that the then plaintiff was entitled to one half of the estate, real and personal, of which Magdalaine Masse, *died possessed*, and the defendants to the other half; and that the cause be remanded to the District Court, in order that a partition be made of said estate pursuant to this decree. Accordingly the District Court directed the parish judge of the parish of St. Landry to make the partition. This officer considered that the words "*estate, real and personal, of which Magdalaine Masse died possessed*," as not including any land which was the separate property of the husband; but confined them to the property common to both spouses. He therefore directed that the two tracts of land which had been granted by the Spanish government to Etienne Sam Fuselier, the natural father of the ancestor of the present plaintiffs, and by the former given to the latter, should not be included in the partition as community property. The report and partition made by the parish judge was set aside in the District Court on the opposition of

the defendants; these two tracts of land being considered as part of the community. WESTERN DIS.
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The District Court in our opinion erred. On the dissolution of a community the property which each spouse owned before its inception, and that which he acquired by inheritance or donation during its continuance, is to be resumed by him or his heirs. The plaintiffs had therefore an exclusive right to these two tracts of land, which their ancestor had received as a donation from his natural father, who had adopted him. The partition of the parish judge was consequently incorrectly set aside.

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Property received as a donation from the Spanish government by one of the spouses does not enter into the community; but remains his separate property and descends to his heirs as such.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be annulled, avoided and reversed; and it is further ordered and decreed that the report and partition of the parish judge, filed in this case, be homologated and take effect: the costs of the appeal to be borne by the defendants and appellees; and those of the District Court and making the partition to be paid by the estate.

MILLER vs. LELEN.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, FOR THE PARISH OF ST.

MARTIN, THE JUDGE THEREOF PRESIDING.

Where a citizen peaceably takes possession of a portion of public land or domain, to which no private claim is set up, and improves it, none but the government can disturb him, in the possession of what he has actually inclosed.

This is an action of trespass, claiming damages for injury done to the plaintiff's inclosures and property. He alleges

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pulled down his fences, and turned in his cattle on the pastures of plaintiff, to his damage, \$2000; for which he prays judgment, and that the defendant be required to desist from his illegal conduct in trespassing on his premises.

The defendant pleaded the general issue; and averred he was in the habit of pasturing his cattle and stock on a trembling prairie belonging to the United States government, until lately, when the plaintiff illegally drove off 80 head of cattle with his slaves and dogs, and so worried and injured them that he lost about 20 head. He prays that the plaintiff's demand be rejected, and that he have judgment in reconvention for \$500 in damages.

Upon these pleadings and issues the case was tried before the court and a jury.

The plaintiff showed that he was in possession, and had inclosed the land or premises about which this controversy arose, and that the defendant pulled down his fences and let in his own cattle to graze and pasture thereon. It also appeared that a portion of the land inclosed was public domain, &c. There was a verdict and judgment for the plaintiff of one dollar in damages, and the defendant appealed.

Morse, for the plaintiff.

T. H. & W. B. Lewis, contra.

Garland, J. delivered the opinion of the court.

The plaintiff alleges the defendant has illegally and wrongfully, at different times, broken down his fences and turned his cattle into his pasture, causing him damages to the amount of \$2,000. The defendant says, that for three years previous to this suit, he has been in the habit of placing his cattle and horses for pasture on a *prairie tremblante*, which is land that belongs to the United States, that he placed upwards of eighty head of his cattle there, and the plaintiff caused his overseer

to have them driven off by his slaves, with dogs, in consequence of which, a number of them died or were lost, for which he claims five hundred dollars in reconvention.

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It appears from the testimony, the plaintiff has a large tract of land lying on the *Lac Pagnier*. He has made a fence on his land from the front to the rear, and by extending it across the public domain, a distance of about twenty-three arpents, it reaches the sea marsh, which is there impassible, and thus incloses a large space, to the exclusion of the neighboring inhabitants, which he uses as a pasture. It is further shown "that there are gates and a passage left through this inclosure for the use of the public," and that the prairie thus inclosed is accessible by a circuitous route around the marsh, a distance of nine miles. Plaintiff made this fence in August, 1837, the defendant advising him how to make it, so as to economize *pieux* and inclose the greatest quantity of land. After the fence was made, defendant wished to have the right of pasturing his cattle within the inclosure, to which plaintiff would not agree to, whereupon defendant broke down the fence and put his cattle in. This he repeated several times, and in February, 1840, this suit was commenced. On the part of the defendant, no particular damage has been shown by driving out his cattle. The jury found a verdict of a dollar for the plaintiff, from which the defendant appealed.

The case has been submitted without argument, or any other than general points filed.

It is unquestionably true, that a portion of plaintiff's fence is on public land, and if proceedings were commenced against him by the government of the United States, under the acts of congress, it is possible he might be dispossessed, but that does not give the defendant a right to take the law into his own hands, and break down the inclosures which have been peaceably made by the occupant. The letter of the law does not allow any man to take exclusive possession of the public domain, but the lenient spirit in which it has been administered, has, we may say, universally tolerated it. In this case

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the defendant advised and aided the plaintiff in making the fence on the public domain, and he now complains of his exclusion from the benefits of it, rather ungraciously. He has no claim to the land or any right of servitude upon it, of which we are informed.

Where a citizen peaceably takes possession of a portion of public land or domain, to which no private claim is set up, and improves it, none but the government can disturb him, in the possession of what he has actually inclosed.

We are of opinion, that if a citizen peaceably takes possession of a portion of the public domain, to which no private claim is set up, and improves or incloses it, no one but the United States and its officers have a right to disturb him in the possession and enjoyment of the portion he has actually inclosed. This possession is one of inches, and cannot extend beyond the actual inclosure by fence, hedge or some other means.

The judgment of the District Court is therefore affirmed with costs.

GUIDRY vs. WOODS.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, FOR THE PARISH OF
ST. LANDRY, THE JUDGE OF THE SEVENTH PRESIDING.

The certificate of purchase from the Register and Receiver is not final evidence of title out of the government, when it is shown, the entry and purchase was improperly allowed; although generally such certificates are considered as sufficient evidence of a sale from the government, as to form the basis of a petitory action.

The Register and Receiver are to decide on the fact, that the applicant for a pre-emption is in possession, and has cultivated the land within the previous year; but if they undertake to grant a pre-emption to land, which the law declares shall not be granted, they are acting on a subject matter clearly not within their jurisdiction.

The commissioner of the general land office, under the supervision of the secretary of the treasury, has the power to declare, what lands, according to law, are liable to entry or location by pre-emption rights or floats; and may cancel the certificate of the Register and Receiver in this respect.

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The evidence and deposition of the Land Commissioner, of cancelling the Register and Receiver's certificate of entry and purchase of land, not liable by law to be sold or entered as pre-emption rights or floats, is admissible in proof of these facts.

In a petitory action, when the defendant exhibits the best title, he will be entitled to *final judgment in his favor*, and not merely one of non-suit.

This is a petitory action, in which the plaintiff claims 126 acres of land on Bayou Boeuf, which he alleges is in possession of the defendant; that he purchased the land from the United States as evidenced by the Register and Receiver's certificate and receipt, in Township 3, South; Range 3 East of the basis Meridian line; and that the defendant has illegally taken possession, asserts title, and has committed waste to his damage \$1000. He prays judgment for the land and that he be quieted in his title and possession thereto, and for his damages. The defendant pleaded the general issue. He avers, he settled on and cultivated the land in contest, by a residence as an actual settler, being the head of a family, over 21 years of age, and a housekeeper; and that he was in the actual occupancy of said land for more than four months preceding the 22d June, 1836, which entitles him to a settlement right thereto, under the act of Congress, passed the 22d June, 1836; that he has proved up his settlement and pre-emption right, but that the Register and Receiver, in violation of law, and disregarding the instructions of the Commissioner of the General Land Office, permitted the entry of this land under a floating right. That the plaintiff has never produced the written consent for the entry of said land in any form or shape, and had no right to enter the same. He further avers, that he has appealed from the acts and decisions of the Register and Receiver to the Commissioner of the general land office, and the object of this suit is to arrest his proceedings and obtain a judgment by virtue of the certificate of said officers. He prays, that the

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September, 1841. his claim to the land.

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Upon these pleadings and issues the cause was tried.

The deposition of the Commissioner of the general land office was offered to show, that the certificate of the Register and Receiver was cancelled, and the land not liable to entry, &c., which was rejected by the court, and a bill of exception taken.

The District Judge was however of opinion, that the plaintiff failed to make out a sufficient title to enable him to recover, gave a judgment of non-suit, from which he appealed.

Linton & Voorhies, for the plaintiff and appellant.

Swayzé & T. H. Lewis, for the defendant. The defendant made due proof of his pre-emption in the land office at Opelousas, under the act of Congress, approved 22d June, 1833, and tendered the money which was refused, because the township map was not returned, and the entry of the land could not be perfected. 16 La. Rep., 84.

2. The plaintiff's title is null and void, because his entry was illegal. There was no legal survey of the land, and it was not liable to entry.

3. Admitting, the plaintiff had a right to locate his *float* on any vacant land, he could not legally locate it on the lot in question. The act of Congress of the 19th June, 1834, gave a right to locate 80 acres only elsewhere, and not 126, as was the case here.

4. The plaintiff's entry and purchase was in violation of the regulations of the land office. See Land Laws, Vol. 2d, 593. Land Instructions, Vol. 2d, 591.

5. The entry of the plaintiff is illegal and void, because the right to locate 80 acres elsewhere, as a float, under the act of 19th June, 1834, requires the location to be made at the time the quarter section is paid for, on which the right accrued, which was not done. Instructions and opinions relative to public lands, 2. Vol. 595, 418, 619 to 634.

6. The original pre-emption, out of which the plaintiff's float grew, was forfeited, and so declared at the general land office. The act of 19th June, 1834, expired by its own limitation in 1836, and this pre-emption was not *determined* and approved until 1837. 2 *Land Laws*, 504.

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Bullard, J. delivered the opinion of the court.

The plaintiff asserts title to a lot of ground, containing one hundred and twenty-six acres and 3-100 of an acre, being in township 3, South Range 3, East of the Basis Meridian on South of latitude 31, which he complains has been taken possession of by Martin Woods, the defendant to his damage, and he prays, that the title may be decreed to be in him.

The defendant, after denying generally the allegations in the plaintiff's petition, alleges, that he, the respondent, long since in person settled on, inhabited and cultivated the lot of land sued for. That he was an actual settler on said land, and head of a family, and above twenty-one years of age, and a house-keeper on the 22d day of June, 1838, and for four months preceding, commencing on the 22d February, 1838. That by reason of the premises, the title to said land vested in him by virtue of an act of Congress, approved on the 22d June of that year, entitled an act to grant pre-emption rights to settlers on the public lands. That he fully proved all the foregoing facts before the Register and Receiver at Opelousas, but that those officers, in violation of law and in disregard of the positive instructions of the Commissioner of the General Land Office permitted the entry of said land by virtue of a floating right. That the plaintiff never produced his written consent to the entry of said land. That the defendant has appealed from the decision of the Register and Receiver to the commissioner of the general land office, and the object of this action is to defeat that appeal.

There was judgment for the defendant as in the case of non-suit, and the plaintiff appealed. The appellant has not favored us with any arguments either written or oral, and relies, we

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presume, upon the evidence of his title in the record. The appellee, in answer to the appeal, prays, that the judgment may be amended and rendered final in his favor, instead of one of non-suit.

It is shown conclusively, that the purchase or entry by the plaintiff has been upon opposition or appeal, annulled and declared void by the commissioner of the general land office, and that decision approved by the secretary of the treasury. This decision is founded upon several grounds, one of which is, that a township plat, duly approved of the township in which the land is situated, did not exist in the office at the time of the purchase; and another, that the float of the plaintiff was not located at the same time, that he availed himself of his principal pre-emption right as an actual settler, according to the construction put upon the act of Congress by the land department. This decision was communicated to the Register and Receiver at Opelousas, and the commissioner in a subsequent communication, remarks: "This office having upon a reference of the case of Hypolite Guidry and Celeste de Lafosse decided, that the floats of either of those individuals could be located on T. 3, S. R. 3, E. and in a letter of the 17th November, communicating to you that decision, and having, notwithstanding permitted the floats of those individuals to be located

The certificate of purchase from the Register and Receiver is not final evidence of title out of the government, when it is shown the entry and purchase was improperly allowed; although generally such certificates are considered as sufficient evidence of a sale from the government, as to form the basis of a petitory action.

in said township, and one thereof on lot 72, T. 3, S. 3, E., above mentioned, this office on the 18th of December last, for those reasons and others mentioned in that communication, cancelled certificates 1917 and 1918. Said tract therefore, being public land, no reason is seen, why the claim of Martin Woods should not have received some action at your hands; and it is accordingly returned for your examination and decision."

It is clear, that the mere certificates of purchase, such as are exhibited in this case, are not final evidence of title out of the government; although this court has generally considered them sufficient evidence of a sale from the government, as to be the basis of a petitory action. Such certificates are liable

to be cancelled by the land department, when they are shown not to have been fairly and legally obtained. The decision of the Register and Receiver, in the absence of fraud, would be conclusive as to the facts, that the applicant for the land was then in possession, and of his cultivation of the land within the previous year; because these questions are directly submitted to those officers. Yet if they undertake to grant pre-emptions to land, on which the law declares they shall not be granted, then they are acting upon a subject matter clearly not within their jurisdiction; as much so as a court, whose jurisdiction was declared not to extend beyond a certain sum, should attempt to take cognizance of a case beyond that sum. 13 Peters, 498.

The evidence further shows, that the certificate was not granted or the entry made until long after the act of Congress of 1834, under which it purports to have been given, had expired by its own limitation. The purchase appears to have been made in virtue of a *pre-emption float*, under the act of Congress of the 19th June, 1834, and the certificate of purchase bears date May 3d, 1836. The construction put upon that law at the department has always been, and the instructions to the Registers and Receivers conformable to it, that these *floating rights*, as they are called, to eighty acres, under the act, must be entered and located at the time of entry of the tracts, on which such floating rights accrued, and that these floats are liable to the same disabilities, as the original pre-emptions, under which they accrued, and which the law requires to be located before the commencement of the public sales, which shall include such original pre-emption tracts. Public Lands, Part II. Opinions and instructions, 633 et seq.

We do not doubt the authority of the commissioner of the general land office, under the supervision of the secretary of the treasury, to decide upon questions such as that presented by the case of Guidry, relating to the true construction of the act of Congress, and declaring void a certificate of purchase of lands, which the law forbids to be sold or disposed of; although

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The Register and Receiver are to decide on the fact, that the applicant for a pre-emption is in possession and has cultivated the land within the previous year; but if they undertake to grant a pre-emption to land, which the law declares shall not be granted, they are acting on a subject matter clearly not within their jurisdiction.

The commissioner of the general land office, under the supervision of the secretary of the treasury, has the power to declare what lands according to law are liable to entry or location by pre-emption rights or floats; and may cancel the certificate of the Register and Receiver in this respect.

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the Register and Receiver alone have jurisdiction to decide who is entitled to a pre-emption, that is to say, as to the sufficiency of proof of settlement and cultivation under those acts. 4 La. Rep. 549; 6 Idem, 12.

But even if the land department had decided otherwise, we held in the case of Jourdan et al. vs. Barrett et al., 13 La. Rep. 41, that the decision of the secretary of the treasury, under the back-concession or pre-emption laws, approving the operations of the surveyor general, in making the apportionment among different claimants, was not conclusive upon the legal rights of the parties under the act of Congress. The same principles apply to other officers, who do not act judicially. The present case can hardly be distinguished from that of Marsh & Miller vs. Gonsoulin, so far as concerns the right of the defendant. 16 La. Rep. 84.

The court, in our opinion, erred in rejecting the written

The evidence and deposition of the land commissioner, of cancelling the Register and Receiver's certificate of entry and purchase of land, not liable by law to be sold or entered as pre-emption rights or floats, is admissible in proof of these facts.

evidence of the cancelling of the plaintiff's certificates, and the depositions of the commissioner of the general land office.

The certificates having been declared null by competent authority, and being evidently void under the act of Congress, which forbids the disposition of the public lands, until a township plat duly approved shall be returned to the officer, and on other legal grounds, it is clear, the plaintiff exhibited no subsisting title to the *locus in quo*.

The defendant insists upon his right to a final judgment, instead of one of non-suit. Although this court disclaims any right to decide upon the question, whether the evidence of occupancy and cultivation be sufficient to entitle the defendant to purchase as a pre-emptioner, yet we do not see, why there should not be final judgment against the plaintiff, and the defendant be protected in his possession against any future action upon the same pretended title. Without deciding therefore, that the defendant has a valid title against the government or any other person, we think his title better than that exhibited by the plaintiff.

In a petitory action, when the defendant exhibits the best title, he will be entitled to final judgment in his favor, and not merely one of non-suit.

It is therefore adjudged and decreed, that the judgment of the district court be reversed and annulled, and ours is, WESTERN DIS.
September, 1841.
that there be final judgment against the plaintiff, and that PERRET ET UX.
VS.
DUPRÉ ET AL.
he pay the costs of both courts.

PERRET ET UX. vs. DUPRÉ ET AL.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT FOR THE PARISH OF
ST. LANDRY, THE JUDGE OF THE SEVENTH PRESIDING.

Interest cannot be recovered for rent arrear from the time it became payable, but only from judicial demand.

So a party is not bound to repair the leased premises when it can only be done but by erecting new buildings. The adverse party may annul or put an end to the lease.

This is an action to recover two instalments of rent of \$500, each, and to annul the lease for the balance of the term.

The plaintiffs show that Madame veuve Miramond, now wife of F. Perret, leased a store, adjacent buildings and lot of ground, to Messrs. Follain, Fux & Co., for six years, from the 16th March, 1838, at \$1000 per annum. Soon after the commencement of this lease, the lessees sold their stock of goods with the lease, to Messrs. Dupré, Jubertie & Tiney, who are and have ever since been in possession.

The present suit is for rent due from the 15th September, 1839, to 15th March, 1840, \$500; and from March 15 to 15th September, 1840, \$500. The plaintiffs pray for judgment for the sum claimed, with the landlord's privilege on the goods and property in the premises; the annulment of the lease, and for general relief.

WESTERN DIS.
September, 1841.

FERRIS ET AL.
vs.

SUPRE ET AL.

The defendants admitted the lease, but averred that the plaintiffs failed to put the leased premises in the necessary repair and condition, to entitle them to rent; that on the contrary, the store house cracked and leaked to such a degree that it became dangerous to stay in it, and caused great damage to their goods. That they repeatedly called on the plaintiffs to repair the said house, which they neglected and refused to do. They expressly aver that they have suffered damage to the amount of \$2000, for which they pray judgment in reconvention.

It appeared from the evidence, that after the defendants occupied the house for some time, the brick store sunk and the wall cracked so much that it was deemed impossible to repair the building, without replacing it by a new one. On this fact being communicated to the plaintiffs, they declined making or attempting to make repairs, and tendered to the defendants a dissolution of the lease. The latter continued in the premises, without attempting any repairs on their part, during the time for which rent is now claimed.

There was judgment for the plaintiffs, for the amount of their demand, with 5 per cent. interest, and the landlord's privilege on the goods, and annulling the lease. The defendants appealed.

Swayzé, for the plaintiffs and appellees, insisted they were not bound to make repairs, which are shown to have been impracticable; and are not liable for damages when the accident or interruption of the lease was beyond their control. The defendants could only demand its dissolution. But are bound to pay rent as long as they continue to occupy the leased premises.

T. H. & W. B. Lewis, for the defendants, maintained the lessors were bound to make all necessary repairs, and to warrant the lessees in the enjoyment of the leased premises; and the lessors are responsible in damages for loss occasioned for want of repairs.

Morphy, J. delivered the opinion of the court.

WESTERN DIS.
September, 1841.

In 1836, the plaintiff, then Madame Miramond, leased to the commercial firm of Follain, Fux & Co. a certain brick store in the town of Opelousas, at the corner of Main and Bellevue streets, together with several out houses and dependencies, for the space of six years, to begin on the 18th of March, 1838, at the rate of \$1000 per annum, payable semi-annually. This lease was subsequently transferred to the present defendants, who accepted the same and put themselves in the place and stead of the original lessees. This suit is brought to recover two instalments of the rent that became due on the 15th of March, 1840, and on the 15th of September following. By a supplemental petition, the plaintiffs prayed for a dissolution of the lease, by reason of the failure of defendants to pay their rent. The answer, after admitting the transfer to defendants of the lease of Follain, Fux & Co., avers that the principal part of the property thus leased is a large brick store house, in which they have constantly kept on hand a large stock of dry goods, groceries, hardware, &c.; that said store house, from the badness of the materials of which it is constructed, or of the workmanship, is so cracked in several places that it is in danger of falling down, and from the wind and rain passing through it by the roof and walls, has become almost useless, and has caused great damage to the goods and merchandize of the defendants; that the plaintiffs, although frequently requested to make the necessary repairs have constantly neglected and refused to have them done; that the defendants are not bound to pay any rent until such repairs are made; but are entitled to damages to the amount of \$2000, which are prayed for in reconvention. The plaintiffs had a judgment below in their favor, and defendants appealed.

FERRET ET UX.
VS.
DUPRE ET AL.

It appears from the evidence that the house is in such a situation as not to be susceptible of being repaired, and rendered safe; that it must be pulled down and entirely rebuilt; the foundations have given way and sunk, and the walls are

WESTERN DIS. cracked in several places, but such as it is, the defendants
September, 1841.

FARRER ET UX.

vs.

DUPRE ET AL.

have occupied it during the twelve months for which the rent is now claimed, and continue to occupy it as a store. In the month of July, 1840, the impracticability of repairing the house having been ascertained, plaintiffs proposed to annul the lease. This was not assented to, and on the 9th of August following, the defendants wrote a letter calling on the plaintiffs to make the necessary repairs, and advising them that if they refused to have them done, they would cause the house to be repaired at the plaintiffs' expense, and retain the amount expended, on the rents due or to become due. No complaint is made of any loss or damage sustained up to that period, which was but a few weeks before the expiration of the time embraced by plaintiffs' claim; and long before writing this letter they had notified plaintiffs through their agent that they would withhold the rent until the repairs were made, but not a word appears to have been said about any claim for damage done to their goods. Had the repairs been practicable, and had they been done either by plaintiffs or by the defendants themselves, we may well infer from their letter that they would have continued to occupy the store without pretending to any indemnity. The defendants having consulted their undertaker about their repairs, and understanding that they could not be made, purchased them a lot and had a store built on it for their use. In this situation of things they do not complain of that part of the judgment which decrees a dissolution of the lease; but they insist that they are entitled to an indemnity. The damage done to their goods appears to have been considerable, and is not shown to have been sustained during the time for which rent is now claimed. From the testimony we are inclined to believe, that it happened subsequently. Whether any indemnity is due at all, after the defendants have refused to dissolve the lease, and have continued to occupy this store in its crazy condition; well knowing that it was not susceptible of being repaired, is a question which will present itself when the rent accrued subsequently, will be demanded

of them. The judgment below is however erroneous, in allowing interest on the instalments of the rent claimed from the time they became due. It should have been allowed only from the day of the judicial demand.

WESTERN DIS.
September, 1841.
PUMPHREY
vs.
PRESCOTT ET AL.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed, except as relates to the interest of five per cent. on the amount claimed, which is hereby allowed only from the third of June, 1841. The costs of this appeal to be borne by the plaintiff and appellee.

Interest cannot be recovered for rent arrear from the time it became payable, but only from judicial demand.

~~THE STATE OF LOUISIANA~~

PUMPHREY vs. PRESCOTT ET AL.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT FOR THE PARISH OF
ST. MARY, THE JUDGE OF THE DISTRICT PRESIDING.

Appeal for delay, and judgment affirmed with the maximum of damages.

The plaintiff obtained an injunction to stay an execution issued on a judgment for \$1745 78, which the defendants had obtained against him, and were proceeding to execute.

The only question raised was as to the right of the clerk to endorse on the execution the description of the property mortgaged, when it had been left blank in the petition. There was judgment dissolving the injunction, with five per cent. damages and ordering the seizure under execution to proceed. The plaintiff appealed.

Anderson, for plaintiff, submitted the case.

T. H. & Wm. B. Lewis, contra.

Bullard, J. delivered the opinion of the court.

WESTERN DIS.
September, 1841.

BIENVENU
vs.
SEGURA.

The present appellees, Prescott and others, having recovered a judgment against W. Pumphrey, the latter obtained an injunction to stay proceedings on an execution issued thereupon, on the allegation, that although it was alleged in the original petition, that the debt sued for, was secured by mortgage, yet the property mortgaged was not designated, and the blank left in the petition was never filled up, yet the clerk undertook on the back of the execution to point out, what property should be seized as mortgaged, consisting of a slave and some horned cattle. He denies the authority of the clerk, thus to designate property to be seized, and alleges, that he had other property, which he had offered to give up to the sheriff, to satisfy the execution. No evidence having been given on the trial in support of these allegations, and it appearing that the property first pointed out was in fact mortgaged, and that the plaintiff in injunction had no other property, the injunction was properly dissolved. The plaintiff has appealed evidently to gain time.

The judgment of the District Court is therefore affirmed with costs, and ten per cent. damages on the amount of the judgment enjoined.

BIENVENU vs. SEGURA.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, FOR THE PARISH OF
ST. MARTIN, THE JUDGE OF THE SEVENTH PRESIDING.

A receipt of full payment by the original payee to the maker of a note, offered against the holder, will be disregarded, when shown to be collusive, and when it is contradicted by the other evidence.

This suit is on a promissory note for \$2000, signed by the defendant, with his *marque ordinaire*; and payable to the

order of one F. Prados, *son-in-law* of the maker, on demand; who endorsed it to the plaintiff.

WESTERN DIS.
September, 1841.

There were various defences set up, which with the material facts and evidence, are fully stated in the opinion of the court.

BIENVENU
vs.
SEGURA.

There was judgment for the plaintiff for \$575, after allowing the credits marked on the note in figures, which were admitted. The defendant appealed.

Voorhies, for the plaintiff.

Morse, for the defendant and appellant.

Morphy, J. delivered the opinion of the court.

This action is brought on a promissory note of \$2000, drawn by the defendant to the order of one Ferdinand Prados, and by the latter endorsed over to the plaintiff. The answer avers, that not being able to read or write, the defendant cannot say, whether the note sued on is signed with his mark or not, and requires strict proof; that if defendant ever signed any such note, it was given through error and without any valid consideration. He further avers, that being ignorant of his rights, he has paid a sum of \$1424 18 on the said note, which is marked in figures on the back of the same, and for which he prays credit. In an amended answer the defendant avers, that he has paid the full amount of the note sued on, and prays to be dismissed from the suit. The plaintiff had a judgment for \$575 82, the balance due on the note; and the defendant appealed.

On the trial, the credits in figures on the back of the note were admitted; the defendant then produced a receipt of Ferdinand Prados, the payee, to prove that he had paid the balance of the note; it is dated the 15th of Janvier, 1840. This receipt we cannot but view as a collusive attempt between the defendant and the payee, his son-in-law, to defeat the plaintiff's claim. It was no doubt considered in that light by the judge below; although it purports to have been given long before

A receipt of full payment by the original payee to the maker of a note, offered against the holder, will be disregarded, when shown to be collusive, and when it is contradicted by the other evidence.

WESTERN DIA.
September, 1841.

RIENVEU
VS.
SEGURA.

this suit was instituted, the defendant, whose answer betrays such a desire to employ every possible means of defence in his power, says not a word of this receipt. It is only in his amended answer, filed two months after, that he pleads full payment. Two disinterested and reputable witnesses testify however, that after the note had become the property of the plaintiff, she had it presented for payment to the defendant by her son; this was some time in August, 1840. The defendant, on that occasion, acknowledged he owed the balance due, and never pretended, *until sued*, that he had paid more than \$1424 18 on account; nor did he say, that it was given without consideration. He expressed a desire, not to pay more on it, adding, that it would be an injustice to his other children: notwithstanding the ignorance of the defendant, of which so much care has been taken to inform us, we believe, that had he really paid the balance yet due on this note, he would have required its production and delivery. The appellee has prayed for damages for the frivolous appeal. We think her entitled to them; but as the delay obtained by the appeal is inconsiderable, we will allow only five per cent. on the amount due.

It is therefore ordered, that the judgment of the court below be affirmed with costs and five per cent. damages.

KEMPER'S HEIRS *vs.* HULICK.WESTERN DIS.
September, 1841.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT FOR THE PARISH

KEMPER'S HEIRS

OF ST. MARY, THE JUDGE OF THE SEVENTH PRESIDING.

vs.
HULICK.

Where the vendor and vendee live in the same house, *possession* follows title.

So where the son was possessed of a slave, who was assessed in his name, and lived in the common dwelling with his father at his death, and his widow took the slave with her when she removed: *Held*, that she was the legal possessor.

This is a possessory action. The plaintiffs, heirs of the late Nathan and Nancy Kemper, claim a slave, which they allege is in the possession of the defendant. The case has once, already been before the court, *vide* 16 La. Rep., 44.

The evidence showed that William Kemper, husband of the defendant and son of Nathan, in his life time brought the slave Stephen from Rapides, and put him on his father's place where they all lived and worked together. After Wm. Kemper's death, his widow (the defendant) continued to reside in her father-in-law's family for a length of time, and when she removed, about the 9th of April, 1837, took the slave Stephen with her, as her own property. In November following the plaintiffs instituted this suit to recover the possession of said slave. The evidence concerning the ownership of the slave is recapitulated in the opinion of the court.

There was judgment for the defendant and the plaintiffs appealed.

Splane, for the plaintiffs.

Gibbons, contra.

Morphy, J. delivered the opinion of the court.

This case, which is a possessory action, had been remanded for trial on its merits in last September term. It comes up again on an appeal taken by the plaintiffs. We have examin-

WESTERN DIS.
September, 1841.

KEMPER'S HEIRS
vs.
MULICK.

ed the evidence and concur in the opinion formed from it by the inferior court. It appears that the boy Stephen, whose possession is claimed by the heirs of the late Nathan Kemper, was brought into the parish of St. Mary by his son, William Kemper, the husband of the defendant, on his return from a visit paid to his uncle in Rapides in the early part of 1824. In that same year this slave was declared by William Kemper to be his, and was placed on the assessment roll as such, to the knowledge and without any objection on the part of his said father; the possession of this slave thus clearly proved to have been in the defendant's husband at that time, has never ceased to exist from aught that appears in the record. He lived with his father during his life time. After his death his widow and child continued for some time in the family, until the defendant removed to some other abode and took away the boy with her.

Where the
vendor and ven-
dee live in the
same house,
possession fol-
lows title.

We have held that when a vendor and vendee live in the same house, possession follows title; 3 Martin, N. S., 337. William Kemper does not appear to have ever divested himself of whatever title he may have had to this slave in 1824, when he returned from Rapides with him in his possession. The circumstance that the widow of William Kemper suffered the slave Stephen to be inventoried among slaves of the estate of Nathan Kemper, the father, and signed the inventory, may have its weight in a dispute about the title; but it does not, in our opinion, affect the acquired possession of W. Kemper. If it is at all to be considered in this suit, it is counterbalanced by the consent given by the late Nathan Kemper, that Stephen should be set down on the assessment roll as belonging to his son.

It is therefore ordered and adjudged that the judgment of the District Court be affirmed with costs.

HAYS vs. HAYS.

WESTERN DIS.
September, 1841.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT FOR THE PARISH OF ST.

MARTIN, THE JUDGE THEREOF PRESIDING.

HAYS
vs.
HAYS.

The lower one of two adjacent estates, owes a servitude to the upper one, of allowing the waters to pass off from the latter through the natural drains over the land of the former.

If the proprietor of the lower estate obstructs the natural flow of the waters of the upper estate he will be compelled to remove such obstructions at his cost.

This is an action instituted by Elizabeth Hays, the proprietor of the upper estate, to compel David Hays, the owner of the estate below her, to remove certain obstructions made by cutting ditches on his land, which dam up and prevent the waters from running off her estate, through the natural drains and channels over the back part of his land into the marsh or swamp in the rear. She alleges the defendant has caused her damage in the deterioration of her land and injury to her crops of \$1000, for which she prays judgment, and that the defendant be compelled to remove the obstruction and allow her the servitude she claims.

The defendant pleaded the general issue; and averred that the ditches he made, so far from injuring were a benefit to plaintiff's land, &c.

The evidence showed that the natural drains from the plaintiff's plantation is over the defendant's; and that the latter cut a ditch across the natural drain which stopped the waters from running off, and caused them to overflow the plaintiff. Previously to making this ditch the waters passed off freely through the natural drain.

There was judgment requiring the defendant to remove the obstructions complained of and he appealed.

Voorhies, for the plaintiff.

Morse, contra.

WESTERN DIS.
September, 1841.

Morphy, J. delivered the opinion of the court.

HAYS
VS.
HAYS.

The petition sets forth that plaintiff is the owner of a plantation of three and a half arpents front by forty in depth, adjacent to and lying above a tract of land owned and possessed by the defendant. That from the situation of these tracts of land; the one belonging to the defendant being below, owes to the other owned by plaintiff, a servitude to receive all the waters which run naturally from it; and which are drained into the marsh or swamp beyond or below the tract of defendant; that the land of the plaintiff has always been drained in the manner described, that is to say, by natural drains conveying the waters from it through the land of defendant to the sea marsh; that without any legal right so to do, the defendant has obstructed and altered the natural course of said waters by digging and making or causing to be made a large ditch across the same, which runs parallel with the dividing line between the two estates, and thereby causes the plaintiff's plantation to be inundated whenever it rains an unusual length of time; that owing to the large mass of waters thus thrown on the land of plaintiff it necessarily becomes much depreciated by being rendered useless and unfit for cultivation. The petition concludes with a prayer that defendant be ordered to remove this obstruction to the natural drains of the plaintiff's land; and moreover be decreed to pay a thousand dollars in damages. The defendant avers that he has cut a ditch on his own land which he had a right to do; that said ditch far from injuring the plaintiff has aided in draining her land; that plaintiff has offered to assist in cutting said ditch provided it should be common to both, and that his land owes no servitude to that of plaintiff but what he has always been willing to allow. The inferior court ordered a survey of the premises to be made and after hearing the cause decreed the removal of the obstruction complained of, but allowed no damages. The defendant appealed.

The evidence in our opinion sustains the judgment rendered in this case. It shows the relative position of the two tracts and the illegal act of defendant in obstructing the natural drains of plaintiff's land, but the latter complains that she did not obtain below, the damages she was entitled to and prays that the judgment be amended accordingly. We have examined the record on this head and find in it nothing which could justify the allowance of any damages. One witness who speaks of the injurious effects of this ditch, says that he knows of no pecuniary loss sustained by the plaintiff; that her husband is a wheelwright by trade, and that their children commonly cultivate a field of only four or five arpents; the same witness says, it is true, that plaintiff's land is worth about \$525, and that its value is diminished about one-fourth in consequence of the *rippling* of the waters, but he adds that in the event of the waters being restored to their natural channel, the land would immediately recover its former value. No evidence is to be found of any real loss sustained by the appellee.

WESTERN DIS.
September, 1841.

LEFEBVRE.
vs.
LASTRAPES.

The lower one of two adjacent estates, owes a servitude to the upper one of allowing the waters to pass off from the latter through the natural drains over the land of the former.

If the proprietor of the lower estate obstructs the natural flow of the waters of the upper estate he will be compelled to remove such obstructions at his cost.

It is therefore ordered and decreed that the judgment of the District Court be affirmed with costs.

LEFEBVRE vs. LASTRAPES.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, FOR THE PARISH OF

ST. MARTIN, THE JUDGE OF THE SEVENTH PRESIDING.

Where the evidence does not support the charges in a physician's bill, the court will give such judgment as may appear reasonable and equitable from the proof and circumstances of the case.

This is an action on a physician's bill of \$600, for medical

WESTERN DIS. attendance of defendant's wife and daughter. There is no
September, 1841. evidence in support of the item of \$50, for attendance on the
LEFEVRE daughter; and it was shown that the plaintiff was called in with
vs. other physicians, to attend the wife with a fractured leg, which
LASTRAPES. he unloosed, took off the old bandage and re-dressed, when the
 patient became better. He made several visits at a distance of
 15 miles.

After hearing all the evidence, the district judge concluded that the medical services of the plaintiff, were worth \$146. From judgment thus rendered the plaintiff appealed.

Voorhies, for the plaintiff.

T. H. & W. B. Lewis, for the defendants.

Martin, J. delivered the opinion of the court.

The plaintiff is appellant from a judgment which reduces his claim for medical services rendered the wife and daughter of defendant from \$600 to the sum of \$146. There is no evidence of the services rendered the daughter nor of their value, although \$50 is claimed. There is but one witness testifying to the services rendered to the wife, and the statements of a professional gentleman as to their value.

It does not appear to us that the District Court erred in reducing the plaintiff's demand to the sum for which judgment was given.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed; and that the costs of this appeal be paid by the plaintiff and appellant.

BROUSSARD vs. BROUSSARD.

WESTERN DIS.
September, 1841.

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF ST. MARTIN.

BROUSSARD
vs.
BROUSSARD.

A judgment which states that it was rendered by *consent of parties*; especially when it does not appear the defendant was ever cited or made a party to the suit, is *illegal*.

This court cannot receive as evidence, in a case, any thing which the judge *a quo* states in his opinion to have been proven. An admission of material facts cannot be proved by any mention in the judge's opinion, that such admissions were made.

This is an action by Edouard Broussard, the son, against his father, in the Court of Probates, to recover his deceased mother's share of the community, and also the amount of her succession, which he alleges is \$2100; besides \$645 56, which he inherited from his grandmother. There was an amended petition setting up the latter claim, but no process of citation was issued or served, and no acceptance of service, or even judgment by default appears to have been taken.

On this state of the case the judge of probates rendered judgment for the plaintiff, stating in the judgment, that it was by *consent of parties*. The defendant appealed and assigned errors, apparent on the face of the record.

Delahoussaye, for the plaintiff.

Voorhies, for the defendant and appellant.

Morphy, J. delivered the opinion of the court.

The plaintiff claims from his father and natural tutor \$2100, for one half of the community property inventoried at the death of his mother, Marguerite Bonin, in 1821. He alleges, that in due course of law the whole property, which became common between the defendant and himself, as the sole heir and legal representative of his mother, was adjudicated to the former at the appraisement price of the inventory; that by law the property, thus adjudicated to his father, remained specially mortgaged to secure the punctual payment of his hereditary portion in the estate of his mother, and that said mortgage im-

WESTERN DIS.
September, 1841

BROUSSARD
vs.
BROUSSARD.

A judgment which states that it was rendered by consent of parties, especially when it does not appear, the defendant was ever cited or made a party to the suit, is illegal.

This court cannot receive as evidence in a case, any thing, which the judge *a quo* states in his opinion to have been proven. An admission of material facts cannot be proved by any mention in the judge's opinion, that such admissions were made.

ports a confession of judgment, which entitles him to an immediate order of seizure and sale of the property mortgaged, which he prays may be issued. By a supplemental petition the plaintiff represents, that his father has also received, as his natural tutor, \$295 46 from his grandmother's estate, and a further sum of \$350 10 from the estate of his grandfather, Baron Bonin. He prays judgment for the sum of \$2100, claimed in his original petition, with legal interest from the 13th of June, 1822, and for the further sum of \$645 56, received by the defendant as aforesaid. On the very day, that this last petition was filed, we find the judge rendering a judgment in conformity with its prayer. This judgment mentions, that it is rendered by *consent of parties*. On the same day, the record shows a service of this judgment made on the defendant, and the sheriff's return of such service. The defendant appealed.

From the proceedings exhibited in this record, it does not appear, that the defendant has ever been a party to them. He never appeared in court by filing any plea, exception or answer, nor does he appear to have been cited. No judgment can be rendered without citation to the party, and without a *contestatio litis*, resulting either from an answer, or from a judgment by default. We have often held, that this court cannot receive as proper evidence for their consideration any thing which the judge *a quo* states in his judgment to have been proven. An admission of material facts could not be proved by any mention in the judge's opinion of its having been made. And what is a consent, that a judgment be rendered, but an admission of all the facts necessary to make out the plaintiff's case? This consent, which is the basis of the judgment, must appear before us by proof, independent of the judgment itself, when the party prays for relief from this court; otherwise the bare mention of such consent in the opinion of the judge of the first instance would conclude the suitors before him, and deprive them of the privilege of litigating their rights in this tribunal; as no appeal lies from a judgment rendered by consent or on the confession of a party. Under this view of the case,

it becomes unnecessary to notice the other errors assigned, as apparent on the face of the record.

It is therefore ordered, that the judgment of the Court of Probates, of the parish of St. Martin, be annulled, avoided and reversed, and that the case be remanded to said court, to be proceeded in according to law, the plaintiff and appellee paying the costs of this appeal.

WESTERN DIA.
September, 1841.

MELANCON'S
HEIRS
VS.
ROBICHAUD'S
HEIRS.

MELANCON'S HEIRS vs. ROBICHAUD'S HEIRS.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT FOR THE PARISH OF ST.
MARTIN, THE JUDGE OF THE SEVENTH PRESIDING.

A warrantor in case of eviction of the purchaser, does not owe interest in the same manner as the purchaser who withholds the price of a thing which produces fruits.

The warrantor who is not in possession of the property, is only bound among other obligations to reimburse the purchase money, or a proportion of it; and he owes interest after he is put *in meret*, or from judicial demand; or if the debt is unliquidated, only from the rendition of judgment.

Fees which parties have to pay to their counsel, for asserting their rights in courts of justice, have never been, nor can they be considered as costs, chargeable to the party cast. It is only taxed costs which a warrantor is bound to reimburse to his vendee.

On the dissolution of injunctions under the statute of 1831, this court has sometimes allowed as damages, the expenses for professional services, which the creditor enjoined has incurred in setting the injunction aside, when improperly obtained.

This case has several times been before this court in various forms, and between different parties, but in relation to the same original matter. The last time it appeared in this court it was remanded for a new trial; on the question of the *amount*

191 357
48 992
191 357
152 1072

WESTERN DIS. of damages the warrantors were liable to pay. See 16 *La. Reports*, 151.
 September, 1841.

MELANCON'S
 HEIRS
 vs.
 ROBICHAUD'S
 HEIRS.

On the return of the case to the District Court, witnesses were called to prove the losses and damage the plaintiffs had sustained by the eviction of 3 arpents of land, making part of 5 arpents purchased at the Probate sale of Charles Melançon's estate, in 1819, by Dr. Duhamel. The eviction of these 3 arpents, in the suit of P. Broussard against Duhamel, took place in 1824. The witnesses called, testified generally, that the land in question was worth \$600 or \$700 per arpent, at the time of the eviction; and that about \$500 was expended in lawyers' fees.

The district judge took the sum of \$650 per arpent as the value of the land, and gave judgment against the defendants for \$1950 on account of the land, and \$500 in damages on account of lawyers' fees. The defendants appealed.

The plaintiffs and appellees prayed an amendment of the judgment, that they be allowed the sum of \$1000, in addition paid to John Brownson for his professional services in the many suits which grew out of the original sale and transaction, for all of which, the defendants were liable as warrantors.

Voorhies, for the plaintiffs and appellees.

T. H. Lewis & Morse, for the defendants and appellants.

Morphy, J. delivered the opinion of the court.

This case which was before us last September term, on the recourse in warranty of the heirs of Melançon against the heirs of Freme Robichaud, was then remanded in order to assess the value of the three arpents of land of which Duhamel, the vendee of the heirs of Melançon, had been evicted in 1824: 16 *La. Rep.* 156. After hearing the evidence adduced by the parties, the judge of the inferior court allowed to the defendant's vendors \$1950, as the value of the three arpents in question, with interest at the rate of five per cent. per annum, from the date of the eviction, to wit: The 21st of

September, 1824, \$500 for fees paid to John Brownson, Esq. to defend the suit occasioned by the eviction, and all legal costs. The warrantors appealed.

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September, 1841.

MELANÇON'S
HEIRS
vs.
ROBICHAUD'S
HEIRS.

They do not complain of the amount they are decreed to pay as the value of the evicted part of the land sold by their ancestor to Charles Melançon, but they contend that interest on this sum was improperly allowed from the date of the eviction; the view they have taken of their obligation is, in our opinion, correct. A warrantor in a case of eviction, does not owe interest in the same manner as a purchaser who withholds the price of a thing which produces fruits; the interest in that case is due to the vendor, as an equivalent for the fruits which the vendee is enjoying. It therefore runs from the time when the price itself should have been paid. But the warrantor who is not in possession of the property is only bound, among

A warrantor in case of eviction of the purchaser, does not owe interest in the same manner as the purchaser who withholds the price of a thing which produces fruits.

other obligations, to reimburse the purchase money or a proportion of it; he owes interest on it only from the day of judicial demand, as in the case of an ordinary debt; if the sum to be reimbursed be certain, interest is due from the time the warrantor has been put *in moré*; if the amount be unliquidated as in the present case, then interest runs only from the date of the judgment fixing the proportion of the price to be returned to the vendee. 8 Martin N. S. 185; 3 La. Rep. 395, 545; 12 *Idem* 314. Of this, the heirs of Melançon cannot complain; their recourse in warranty against their sellers was open to them in 1824, when the eviction was pronounced; they knew then or must be presumed to have known the measure of damages they were entitled to, and in the same suit and at the same time, they might have obtained a judgment against their warrantors, for the sum which is now decreed to them. They are in the situation of an ordinary creditor who does not urge his claim, or is slow and remiss in the prosecution of it. Instead of exercising an immediate recourse against their sellers, they have thought proper to direct all their efforts against their vendee; their great object seems to have been to hold him to his bargain with them,

The warrantor who is not in possession of the property, is only bound among other obligations to reimburse the purchase money, or a proportion of it; and he owes interest after he is put *in moré*, or from judicial demand; or if the debt is unliquidated, only from the rendition of judgment.

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HEIRS
VS.
BOUCHAUD'S
HEIRS.

which is admitted on all hands, to have been a hard one ; and they have pursued it for a number of years with a tenacity and perseverance worthy of a better result. Now that all their efforts against him have proved abortive, they resort to their action against their sellers, and set up a claim for interest which, in our opinion, is not sanctioned by law. C. of Pr., arts. 558 and 554 ; 8 Martin, N. S., 612.

The fee of \$500, paid by the heirs of Melançon to their attorney, appears also to us to have been improperly charged to the warrantors. By the old Civil Code, under which the sale by their ancestor was made, the buyer had a right to claim, 1st, the restitution of the price ; 2d, that of the fruits or revenues, when he is obliged to return them to the owner who evicts him ; 3d, all the costs occasioned either by the suit in warranty, against the buyer, or by that brought by the original plaintiff ; 4th, in fine, the damages, when he has suffered any, besides the price that he has paid ; p. 354, art. 54. The fees, which parties have to pay to their counsel for asserting their rights in the courts of justice, have never been, nor can they be considered as costs, chargeable to the party cast ; it is only the taxed costs, which a warrantor is bound to reimburse to his vendee. The fees paid for professional services cannot either be allowed under the head of damages ; the article just quoted contemplates those which may result from the loss of the thing sold, over and above the original price, *propter rem ipsam non habitam* ; Pothier, vente, p. 74, No. 120. We are not aware,

Fees which parties have to pay to their counsel for asserting their rights in courts of justice, have never been, nor can they be considered as costs, chargeable to the party cast. It is only taxed costs which a warrantor is bound to reimburse to his vendee.

On the dissolution of injunctions under the statute of 1831, this court has sometimes allowed as damages, the expenses for professional services, which the creditor enjoined has incurred in setting the injunction aside, when improperly obtained. that fees which parties evicted have paid for professional services, have ever, with the sanction of this tribunal, been charged to warrantors either as costs or as damages. If they were allowed in a case of this kind, why should they not be claimed in every suit ? The obligation of a debtor on a note of hand, to pay his creditor, and not to put him to the expense of employing counsel, to collect his debt, is not less strong and binding, than that of a seller, to give a good title, and to warrant the same. It is difficult to distinguish between the two cases. It is true, that on the dissolution of injunctions, this

court has sometimes thought proper, under the statute of 1831, to allow as damages the expenses for professional services, which the creditor enjoined has incurred in setting them aside. In so doing, the court might have supposed, that they were carrying out the intentions of the law-giver, whose well known object was to punish the bad faith of debtors, who were daily impeding the execution of the judgments obtained against them on the most frivolous pretences. But we are not disposed to go further; it is not long since, that we were called upon to allow damages to a third possessor, whose injunction was perpetuated on the ground, that he had been put to the expense of employing counsel, to arrest proceedings against him, which were illegal, and which should never have been carried on. 17 La. Rep., 265. This claim we rejected as unsupported by law; we entertain the same opinion of that now set up by the heirs of Melançon; but they are entitled to the amount of \$274 75, which they appear to have paid for costs in two suits relative to the eviction of the land.

It is therefore ordered, that the judgment of the District Court be annulled, avoided and reversed; and now proceeding to render such judgment as should, in our opinion, have been given below: It is decreed, that the heirs of Melançon do recover of the heirs of Robichaud, their warrantors, the sum of two thousand two hundred and twenty-four dollars and forty-five cents, with five per cent. interest per annum on the same, from the 5th of May, 1841, until paid; with the further costs below to be taxed in this suit; those of this appeal to be paid by the appellees.

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MELANÇON'S
HEIRS
VS.
ROBICHAUD'S
HEIRS.

WESTERN DIS.
September, 1841.

BLANCHARD vs. CASTILLE.

BLANCHARD
vs.
CASTILLE.

191 362
45 1089

191 362
46 846

191 362
50 735

191 362
106 689

19 362
109 823

19 362
115 865

19 362
118 647

118 757

19 362
121 491

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, FOR THE PARISH OF ST.

MARTIN, THE JUDGE OF THE DISTRICT PRESIDING.

Conversations between the husband and wife out of the presence of the defendant, who was not party to the sale or transaction to which they relate, are inadmissible in evidence.

Threats and undue influence of the husband, to induce his wife to sign an act of sale of her paraphernal property to B., even if sufficient to annul it as between them, cannot affect the rights or be given in evidence against C., a *bona fide* purchaser from B.

A *bona fide* purchaser, without notice, is not affected by fraud in his vendor, who has a legal title to the property sold.

The possessor of slaves under a just title, in good faith, will be protected by the prescription of five years.

This is an action to recover a certain slave, named Celeste, and her two children, in the possession of the defendant. The plaintiff alleges, she was induced by the threats, violence and coercion of her husband, in the year 1829, to sell said slaves, who were her paraphernal property, to one B. Thibodeaux, with whom her husband colluded. That said sale was fraudulent and without consideration; purporting to be for \$1000 in cash, but in fact only cattle were received, and which were converted to the exclusive benefit and use of her said husband, then living. She prays, that the sale to Thibodeaux be declared null, and that the defendant, who holds the said slaves without title, be decreed to give them up. The defendant pleaded the general issue; and averred, that the sale to Thibodeaux was valid and binding; and that he purchased them in good faith at the probate sale of Thibodeaux's succession. That the fraud, violence and threats alleged by the plaintiff, were without the knowledge of Thibodeaux, who was a purchaser in good faith, and was not ground for the rescission of the sale even as to him. He pleads prescription.

Upon these issues the cause was tried. The plaintiff offered parol evidence of the threats and fraud used by her husband, which was objected to and rejected. There was judgment for the defendant, and the plaintiff appealed.

T. H. & W. B. Lewis, for the plaintiff.

WESTERN DIG.
September, 1841.

Voorhies, for the defendant.

BLANCHARD
VS.
CASTLEMAN

Morphy, J. delivered the opinion of the court.

The plaintiff seeks to recover a negro woman and two children, her paraphernal property, on the ground, that she was compelled by Alexander Lormaud, her husband, to sell them to the late Benjamin Thibodeaux; at the sale of whose succession they were purchased by defendant. The petition alleges in substance, that in 1839, plaintiff's husband endeavored to persuade her to sell these slaves; that after repeatedly and without success calling upon her to comply with his wishes, he threatened to abandon her and kill the slaves, if she did not consent to sell them; that being informed, that said Benjamin Thibodeaux was the person, to whom the sale was intended to be made, she advised him not to buy them, as her consent was obtained through coercion, and she should never consider herself bound by it; that notwithstanding this notice and the perfect knowledge he had of the means resorted to by her husband, to coerce her consent, the said Thibodeaux and her husband had a deed of sale prepared, which she was induced to sign as vendor by threats, marital coercion, and other illegal means; and that, although the sale recites, that a thousand dollars were paid in cash, she received no part of said sum, but her husband received some cattle in payment of the price, which he sold and disposed of for his private use and benefit.

The answer avers, that the sale from plaintiff to Thibodeaux, under whom defendant claims, was valid, and for a good consideration; that no fraud or collusion existed on the part of said Thibodeaux; that if any threats or violence were used towards plaintiff by her husband, it was not to his knowledge, and that at all events they were not such, as should cause the sale to be rescinded. There was a judgment below in favor of the defendant, from which plaintiff appealed.

WESTERN DIS.
September, 1841.

BLANCHARD
vs.
CASTILLE.

Conversations between the husband and wife out of the presence of the defendant, who was not privy to the sale or transaction, to which they relate, are inadmissible in evidence.

Threats and undue influence of the husband, to induce his wife to sign an act of sale of her paraphernal property to B., even if sufficient to annul it as between them, cannot affect the rights or be given in evidence against C., a *bona fide* purchaser from B.

A *bona fide* purchaser, without notice, is not affected by fraud in his vendor, who has a legal title to the property sold.

The possessor of slaves under a just title, in good faith, will be protected by the prescription of five years.

On the trial, plaintiff offered to prove by several witnesses the allegations of her petition in relation to the threats of Alexander Lormaud, and the notice she had given Thibodeaux, that her consent was not free, and that she should not consider herself as bound by it; this testimony was objected to on the ground, that conversations between the husband and wife, out of the presence of defendant, who was not privy to said sale, could not be given in evidence against him; the judge being of this opinion, a bill of exceptions was taken, to which our attention has been drawn. It appears to us, that the testimony was properly rejected; but had it been heard, it could not, in our opinion, have assisted plaintiff much in her claim. Admitting, that the threats and undue influence alleged by her have existed, and would have sufficed to annul the conveyance from her to Thibodeaux, the defendant, who is a *bona fide* purchaser, without notice, cannot be thereby affected. He purchased these slaves upwards of four years thereafter, at a public sale of the estate of a person having an apparently legal title, and has paid a valuable consideration. It has more than once been held, that a *bona fide* purchaser, without notice, is not affected by fraud in his vendor, who has a legal title to the property sold. 8 Martin, N. S., 342; Thomas vs. Mad; and Miles vs. Oden et al.; Idem, 227; see also 6 Cranch, 133; Fletcher vs. Peck. If such be the well established rule with regard to fraud, we can see no good reason, why it should not obtain in a case, where threats and violence are alleged, for the former as well as the latter are among the causes, which invalidate contracts between the parties to them; want of consent in both cases is the ground, on which the nullity or rescission can be claimed, La. Code, 1813, and the equity and reason for protecting a *bona fide* purchaser, without notice, are as strong in one case as in the other. It is not unworthy of remark, that the plaintiff has waited for more than five years, after the slaves have passed out of the possession of Thibodeaux or his heirs, to bring her complaint. If every other defence had failed the defendant, he would be protected by prescription;

for he has possessed these slaves under a just title and in good faith more than five years, before the institution of the present suit. La. Code, art. 3444. WESTERN DIS.
September, 1841,

CANAL BANK
vs.
FISHER,

It is therefore ordered and decreed, that the judgment of the District Court be affirmed with costs.

CANAL BANK vs. FISHER.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, FOR THE PARISH OF
ST. MARY, THE JUDGE THEREOF PRESIDING.

A slight variation in setting out the name of a corporation will not affect the right to maintain the action.

This is a suit on a promissory note signed by the defendant; who excepted to the petition, because the plaintiffs sue by the style and name of the "New Orleans Canal and Banking Company," instead of the "The President and Director of the New Orleans Canal and Banking Company at Franklin." This exception was overruled. The defendant pleaded a general denial; and judgment being for the plaintiffs, he appealed.

Maskell, for the plaintiffs.

Anderson, for defendant and appellant, submitted the case.

Garland, J. delivered the opinion of the court.

This is an action on a promissory note. The defendant excepts that the "action cannot be sustained, the petition does not mention the President and the Directors of the said Canal and Banking Company at Franklin, where the note was made

WESTERN DISTRICT, payable." The article 423 of the La. Code, says corporations must have a name given them by the Legislature, and in that *September, 1841.*
 PARROTT ET UX. they must sue or be sued, although a slight variation in this
 vs.
 EDWARDS ET AL. name is not important. In this case the suit is in the name given by the Legislature, and the purpose of the exception seems to be to compel the corporation to append something to the name given by law. The exception is untenable and the appeal in our opinion frivolous.

The judgment of the District Court is therefore affirmed with costs, and ten per centum damages.



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PARROTT ET UX. vs. EDWARDS ET AL.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT FOR THE PARISH

OF ST. LANDRY, THE JUDGE OF THE SEVENTH PRESIDING.

Where a third person is interposed and sued as a trespasser, and disturbing the plaintiffs in their possession and title to a certain tract of land, and the vendors of the plaintiffs are called in warranty, they will be discharged and released, when it is shown the action against the immediate defendant is simulated, or when the suit fails or is not prosecuted as to him.

This is an action by the plaintiff and wife, instituted in the first instance against one Edwards, who was their overseer, alleging he had entered and was committing waste on a tract of land which they had purchased from one Louis De Kerlegand, for the sum of \$6000, all of which was paid except the last instalment of \$2,250, which was then due. They aver they are in danger of eviction, and pray that Edwards and De Kerlegand be cited; and that they have judgment declaring them to be the true owners of said land, and also for damages against Edwards; and further, that in case of evic-

tion, they be released from the judgment of the instalment of the price now due, and recover \$750 in damages; and finally, that the payment of this instalment be suspended, until De Kerlegand restore him to quiet and the peaceable possession of said land.

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September, 1841.

FARROTT ET UX.
VS.

EDWARDS ET AL.

De Kerlegand appeared and pleaded the general issue, and averred he made a good title to the land in question, which he conveyed to the plaintiffs: He denies specially that Edwards ever did, or has at any time disturbed the possession or title of the plaintiffs, and that he simply resided or was on the land as the overseer of the plaintiffs. He further states that he purchased the land from Wm. Wikoff, whom he calls in warranty; and prays that the demand of plaintiffs be rejected as collusive and fraudulent with the defendant, Edwards.

Wikoff appeared, defended the title, and called on his vendor.

Edwards pleaded the general issue; avers he has cut timber from the public land in the neighborhood, but not from the *locus in quo*. He prays to be dismissed.

Upon these pleadings and issues the cause was tried.

On the trial, the plaintiffs made no attempt to try the case as against Edwards, but proceeded against De Kerlegand and his warrantor as if the disturbance had actually taken place.

Upon the pleadings and evidence, the District court gave judgment for the plaintiffs, against De Kerlegand for \$1,390; and in favor of the latter over against Wikoff for the same amount. De Kerlegand and Wikoff appealed.

T. H. Lewis, for the plaintiffs, contended:

1. The plaintiffs being disturbed in their possession of the land in question, had a right to sue the disturber and cite their vendor, in the same suit. La. Code, arts. 2498 and 2495.

2. The warrantors by appearing and contesting the cause on its merits, are precluded from objecting to the form of the action.

Swayzé, for the defendants and appellants.

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September, 1841.

PABOTT ET UX.
vs.
EDWARDS ET AL.

Martin, J. delivered the opinion of the court.

The plaintiffs brought this action against one Edwards, for a trespassing on their land, by cutting down trees, and committing other acts of waste, under a pretence of title, and threatening to evict them of a portion of their land. They made the defendant, De Kerlegand, their vendor and warrantor, a party to the suit; praying that in case the court sustained the title or claim of Edwards, they may have judgment against De Kerlegand for part of the price of said land already paid, and released and discharged from the third and last instalment of \$2,250 also due; and that De Kerlegand come in and defend this suit. The latter appeared and cited William Wikoff, his vendor in warranty.

The defendant, Edwards, did not deny cutting down some trees, but averred that the *locus in quo* was part of the vacant land of the United States, and that he committed no disturbance or trespass on the plaintiffs' land.

The defendant, De Kerlegand, pleaded the general issue; averred that in the institution of this suit the plaintiffs colluded with the defendant Edwards for the purpose of vexing him, (De Kerlegand,) and for the further purpose of delaying or avoiding the payment of the balance of the price of said land already due; that the defendant, Edwards, never claimed title to the *locus in quo*, and if he resided thereon, or does so now, it was with the permission and consent of the plaintiffs, whose overseer he is.

Wikoff appeared and pleaded the general issue; and averred he had a good and valid title, which he conveyed to De Kerlegand.

The plaintiffs made no attempt to obtain judgment against the defendant, Edwards: But judgment was given in their favor against De Kerlegand, their vendor, and for the latter against Wikoff; both for the same amount. From this judgment De Kerlegand and Wikoff are appellants.

They contend that the judgment is *ultra petitem*, because

it was asked only on a contingency; to wit: the recognition of Edwards' title, and this title has not been acted upon.

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September, 1841.
PARBOTT ET UX.
VS.
EDWARDS ET AL.

The plaintiffs and appellees contend, that they and the appellants have brought the title of Wikoff under the consideration of the court, and that it has been adjudged defective.

It appears to us, that the defendants having pleaded the general issue, it behoved the plaintiffs to establish every allegation in the petition; the most material one of which was, the validity of the title of Edwards; and the defendants were called in for the principal purpose of protecting the plaintiffs by a successful opposition to the recognition of Edwards' title by the court. This was the contingency on which the petitioners claimed judgment against the defendants.

The petition did not allege any defect in the plaintiffs's title, resulting from the invalidity of the titles of his immediate and mediate vendors, De Kerlegand and Wikoff. There was no necessity for either of the latter to produce or support his title, until Edwards produced one apparently good, and adverse.

The suit, so far as Edwards is concerned, appears to be a simulated one; instituted for no other purpose than that of ingrafting thereon, an action against the appellants. This mode of proceeding cannot receive the countenance of this court; and must be at once repudiated. The principal support, or contingency on which the action depended having failed, all that is accessory or dependant on it must share a like fate.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be annulled, avoided and reversed; and that there be judgment in favor of the defendants and appellants, with costs in both courts.

CASES IN THE SUPREME COURT

WESTERN DIS.
September, 1841.

WILLIAMS vs. BRASHEAR.

WILLIAMS
vs.
BRASHEAR.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT FOR THE PARISH OF
ST. MARY, THE JUDGE OF THE SEVENTH PRESIDING.

It is not sufficient to show, that in point of fact no damage was sustained by the neglect of the holder of a bill of exchange, to give notice of its dishonor, in order to hold the drawer liable after its acceptance.

Where the drawer has no funds in the hands of the drawees, and has no right to expect his bill will be paid, there being no commercial transactions between the parties, notice of non-payment and protest is unnecessary.

But where there are running accounts between the drawer and drawees, to induce the former to believe, his bill will be honored, he is entitled to notice of non-payment, although in fact he had no funds in the hands of the drawees.

This suit was instituted on a draft drawn by the defendant on Bemias Brashear & Co., in favor of the plaintiff, and protested for non-payment at maturity; but no notice of protest was given to the defendant or drawer of the bill. This case has already been before the court. See 16 La. Rep., 77.

On the return of the case, the defendant proved, he had sold his molasses to the drawees at the time the draft was accepted, and had a running account with them; although it did not appear there was any thing due, when the draft was at maturity. There was judgment against the plaintiff; and in favor of the defendant for his costs; the plaintiff appealed.

Morse, for the plaintiff.

Dwight, for the defendant.

Bullard, J. delivered the opinion of the court.

This case was before us at the last term, and was then remanded for a new trial on newly discovered evidence; 16 La. Rep., 77. The result of that trial was a judgment in favor of the drawer of the bill of exchange, on the ground of a want of notice of protest for non-payment; and the plaintiff in his turn has appealed.

The sole question which the case presents is, whether the defendant, the drawer of the bill, which had been duly accepted, was entitled to notice of the failure to pay by the acceptors at its maturity. It is for the plaintiff to excuse the want of notice, by bringing the case within the exceptions to the general rule.

The evidence shows, that there were dealings between the drawer and acceptors of a mercantile character, and a running account. The books were very loosely kept, but there was always a balance against the defendant. They show no transactions, it is true, between the parties during the time, which elapsed after the date of the bill, and before its maturity. But a witness, sworn on the last trial, deposes, that in the spring of 1834, about the time the bill was drawn, two members of the firm offered to sell to him some molasses, then at Belle Isle, on the plantation of Dr. Brashear, the defendant, which they said they had purchased of him, sufficient in quantity to pay the witness's claim upon the house, which was about \$900. He further understood, that in consequence of rains the molasses were lost during that summer, and he was asked to accompany one of the partners in a visit to Dr. Brashear, to ascertain who was to sustain the loss.

It is not sufficient to show, that in point of fact no damage was sustained by the neglect of the holder of the bill, to give notice of its dishonor. The doctrine, well settled at the present day, appears to be, as was substantially recognized by this court in the case of *Bloodgood vs. Hawthorn*, 9 La. Rep., 124, that if the drawer of a bill of exchange has no funds in the hands of the drawee, and has no right to expect it will be paid, there being no commercial transactions between the parties, notice of non-payment and protest is unnecessary. But when the drawer has a right to expect, that his bill will be honored, as when there are running accounts between the drawer and drawee, he is entitled to notice, although in point of fact he had no funds in the hands of the drawee, when the bill was drawn. The sound sense and justice of the exception are, that when

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September, 1841.

WILLIAMS
vs.
BRASHEAR.

It is not sufficient to show, that in point of fact no damage was sustained by the neglect of the holder of a bill of exchange, to give notice of its dishonor, in order to hold the drawer liable after its acceptance.

Where the drawer has no funds in the hands of the drawee, and has no right to expect his bill will be paid, there being no commercial transactions between the parties, notice of non-payment and protest is unnecessary.

But where there are running accounts between the drawer and drawee, to induce the former to believe his bill will be honored, he is entitled to notice of non-payment, although in fact he had no funds in the hands of the drawee.

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September, 1841.

M'MILLEN
vs.
M'KEROLL ET AL.

the drawer knew, that he had no right to draw, and has the strongest reason to believe, that the bill will not be paid, the motives for requiring notice of the dishonor do not exist, and his case comes within the reason of the exception. Chitty, on Bills, 468, in Notes; 10 Peters, 572; 2 Brockenborough's Circuit Court Reports, 20.

Tested by these principles, it appears to us, that the defendant, in the present case, was entitled to be notified of the dishonor of his bill. Not only did there exist commercial dealings between him and the drawees, but the bill was accepted, and the drawees precluded thereby from denying the right of the defendant to draw on them, at least so far as it concerns a holder. We have been referred to no case, which carries the doctrine so far as to embrace a case like this, although in point of fact, there was a balance at the time against the drawer. He had a right to expect, that the bill would be paid at maturity, and was entitled to notice, in order that he might withhold any funds, destined to reimburse the acceptors.

It is therefore adjudged and decreed, that the judgment of the District Court be affirmed with costs.

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M'MILLEN vs. M'KEROLL ET AL.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, FOR THE PARISH OF
 ST. MARY, THE JUDGE OF THE SIXTH PRESIDING.

The defendant in injunction injoining his order of seizure and sale, changes the proceedings from the *via executiva* to the *via ordinaria*, when he prays for judgment against the debtor. In cases of this kind no damages should be allowed, and judgment must be given as in an ordinary suit.

This is an injunction case. The plaintiff sued out an injunc-

tion to restrain and injoin proceedings on an order of seizure and sale which had issued against a house and lot in the town of Franklin, which he had purchased the 6th March, 1837, at a sale made by order of the Court of Probates, to effect a partition between the said M'Keroll and the heirs of Peter A. Dejarnett, deceased. M'Millen purchased the premises for \$3450, payable in three instalments, in April, 1837, 8, and 9, with ten per cent. interest from the time each became due until actually paid. On the 18th May, 1838, the first instalment of \$1150, remaining unpaid, M'Keroll and others obtained an order of seizure and sale against the property which was enjoined by the parish judge on the following grounds:

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M'MILLEN
VS.
M'KEROLL ET AL.

1. The plaintiff in injunction had no notice of the seizure.
2. There is no oath annexed to the petition for the order of seizure.
3. That this instalment is liable to offsets and credits not allowed.
4. Because the instrument sued on is a proces verbal and not an executory title.
5. No order of seizure can issue except on a title importing a confession of judgment.
6. The order is illegal and oppressive, being intended to harass and injure him.

He prays for an injunction to restrain all proceedings under said order, and also for judgment allowing him damages for the injury sustained. The injunction was granted by the parish judge, on the plaintiff giving his bond with security in the sum of \$575.

The defendants filed a written motion to dissolve the injunction on the ground, among others, that the affidavit was insufficient, the facts not being positively stated under oath. They also allege the injunction was wrongfully sued out and should be dissolved with damages, &c. The plaintiff filed a supplemental petition setting forth some new circumstances, and reiterating his former allegations.

In March and April, 1839, the defendants filed two answers

WESTERN DIS. nearly the same in substance, denying the plaintiff's allegations
September, 1841. generally, and pray that they have judgment for the amount

M'MILLEN
vs.
M'KEROLE ET AL.

claimed in the petition for the order of seizure, with mortgage and privilege on the property therein mentioned; and that the injunction be dissolved with full damages and interest according to law for the wrongful suing out of the same.

Upon these pleadings and issues the cause was tried.

The district judge being of opinion that the injunction was wrongfully sued out, gave judgment dissolving it with ten per cent. interest on \$3450 from the 23d June, 1837, until the day of its dissolution; and also ten per cent. damages on the same sum with costs, against the principal and surety in the injunction. The plaintiff appealed.

Dwight, for the plaintiff.

Maskell & T. H. Lewis, for the defendants in injunction.

Morphy, J. delivered the opinion of the court.

The defendants having sued out an order of seizure upon a mortgage retained by them to secure the payment of the price of a house and lot in the town of Franklin purchased by plaintiff, the latter enjoined the proceedings on various grounds which it is unnecessary to notice. The suit had been brought for the first instalment of the price, amounting to \$1150, which had become due on the 1st of April, 1837, and which bore interest at the rate of ten per cent. per annum. The defendants made a written motion to dissolve the injunction, and prayed for damages under the statute against plaintiff and his surety. The plaintiff then filed an amended petition setting forth additional grounds in support of his injunction. About eighteen months after, the defendants put in an answer in which they deny all the facts set forth in the original and amended petitions, and pray that the injunction be set aside. They allege that the plaintiff is really and truly indebted unto them in the sum and in the manner set forth in their petition on which the

order of seizure issued, and that they are entitled to a privilege as vendors on the property therein described. They pray that they may have a judgment against the plaintiff for the aforesaid amount, and that the property mortgaged may be ordered to be seized and sold to satisfy their demand, together with costs; and they pray moreover for general relief.

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M'MILLEN
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On these pleadings, and more than two years after the injunction had issued, the parties went to trial. In the meantime two other instalments of the price having become due, the judge below dissolved the injunction, and decreed the plaintiff and his surety to pay to the defendants, ten per cent. per annum interest on \$3450 from the 23d of June, 1837, to the day of the dissolution of the injunction, and ten per cent. damages on \$3450, with costs of suit, and directed the sheriff to proceed as if no injunction had been obtained. Both plaintiff and his surety appealed.

It is clear that even had the trial below taken place on a motion to dissolve, and the court had thought proper to grant it and allow damages, they should have been awarded only on the amount due at the time the injunction was taken out. The obligation of the surety could not become more onerous pending the suit in consequence of the other instalments falling due; and the statute authorizes this penalty only in relation to the amount actually enjoined. But it appears to us that this case is not to be distinguished from that reported in 16 La. Rep., 101, in which we held that a creditor who has sued out an order of seizure, changes the proceedings from the *via executiva* to the *ordinaria*, when he prays for a judgment against his debtor who has enjoined his order of seizure. This he may sometimes consider it his interest to do; if, for instance, he is apprehensive that the injunction may be sustained, he may prefer taking this course to avoid instituting another suit for the collection of his debt; or if he wishes to obtain a general mortgage on all the property of his debtor. In cases of this kind, no damages should be allowed, and judgment should be given as in an ordinary suit.

The defendant in injunction joining his order of seizure and sale, changes the proceedings from the *via executiva* to the *via ordinaria*, when he prays for judgment against the debtor. In cases of this kind no damages should be allowed, and judgment must be given as in an ordinary suit.

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It is therefore ordered, adjudged and decreed that the judgment of the District Court be reversed; and proceeding now to give such judgment as, in our opinion, should have been rendered below: it is ordered and decreed that these defendants in injunction do recover of John P. M'Millen, the sum of eleven hundred and fifty dollars; with interest at the rate of ten per cent. per annum from the 1st of April, 1837, until paid, with costs below; those of this appeal to be borne by the appellees; and that the premises mortgaged may be seized and sold to satisfy this judgment.

LABAUVE ET AL. vs. DECLOUT.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT FOR THE PARISH OF ST.

MARTIN, THE JUDGE OF THE SEVENTH PRESIDING.

Where there are ambiguities in the boundaries and corners of a tract of land in controversy, between the defendant and plaintiffs, as vendor and vendees, occasioned by leaving blanks in the notarial act of sale, a private act previously executed between the same parties, will be received in evidence to explain and show the true boundaries and corners, when it is not inconsistent with the notarial act.

This is an injunction case. The plaintiffs were purchasers of a tract of land from the defendant, described in the notarial act of sale, "as situated in the parish of St. Martin, at Fausse Pointe, at a place called Les Isles;" "having arpents front; starting from the upper line to arpents on the bayou Têche; and from the lower line to arpents of said bayou, with the whole depth from the above named limit, and running towards the big woods to which the said land has rights, with all the houses, cabins, and other improvements."

The act of sale retained the usual mortgage and vendor's privilege. A balance of \$2,865, remaining due and unpaid of the price, the defendant took out an order of seizure and sale which was enjoined on the following grounds:

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DECLOUT.

First—Because A. Mallet père, the husband of Reinè Benoit, one of the parties to the act of sale and the order of seizure, was not made a party; nor did he authorize and join his said wife in the act of sale.

Second—The property seized is not described in the notice of seizure or advertisement, as it is in the act of sale, nor is the description made with sufficient accuracy and certainty to form the basis of a judicial sale; not showing any particular quantity of land, or boundaries.

Third—From the uncertainty in the quantity and boundaries, no fair estimate could be made of the value of the land seized.

Fourth—From the vague and indefinite description given, both in the act of sale and executory proceedings, if the sheriff was to offer the land for sale, he would not be able to make a title to the purchaser for any specific quantity.

Fifth—That said order of seizure and the proceedings thereon are illegal, irregular, and cannot be carried into effect without causing great injury to the petitioners.

Sixth—That the deed of sale conveys to them no specific quantity of land; the quantity in front and in depth is not stated, and that both this and the boundary are left in blank; they acquired no title which they could legally transfer or make use of, and therefore the sale is a nullity.

That the defendant has failed and neglected to have said land surveyed, and the quantity and boundaries filled up and made certain, as he was requested and bound to do to complete the sale; they pray that said sale be cancelled and annulled, and the price returned to them with damages: and in default of this, that the defendant be decreed to complete the title by designating the quantity and boundaries, and filling up the

WESTERN DIS. blanks in their deed of sale; and that this injunction be perpetuated, till the defendant complies with their demand herein.
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 VS.
DECLOUNT.

The defendant admitted the sale of the land as alleged; that the quantity was unknown, but the blanks were to be filled up subsequently, because the parties did not know the exact distance from the Bayou Têche to a certain line which had been previously agreed upon as the front line; and which were to be filled up at any subsequent time, whenever the plaintiffs should require it, &c. He avers his executory process was regularly sued out, and that the injunction should be dissolved with damages.

On the trial, among other testimony introduced by the parties, the defendant offered a private act of sale which had been executed by the parties describing the land more minutely than the public act afterwards signed by them, in consequence of the blanks left in the latter. This instrument was objected to because nothing was admissible in evidence against an authentic deed. The objections were overruled and the document admitted, and a bill of exceptions taken.

There was judgment for the defendant for the balance due on the price of the land sold; and ordering the blanks in the deed of sale to be filled up according to a plat of survey in evidence, and that the land be seized and sold to satisfy the judgment. The plaintiffs appealed.

Voorhies & Morse, for the plaintiffs in injunction, insisted the defendant's demand should be rejected on two grounds:

1st. Because the whole of the proceedings on which the order of seizure and sale is predicated, are defective, as well those preceding as those succeeding the order. The act of sale does not specify any certain object sold, but is in blank as to that; the order of seizure and sale directs no specific object to be sold, and the advertisement of the sheriff is equally uncertain. One of the plaintiffs being married no notice was ever served on her husband. 9 La. Rep. 543.

2d. Because the sale in question is null, and can have no effect against any of the parties. In a sale, the law requires that the thing sold should be certain and determinate, without which, the contract would not be valid and binding. This sale does not give the description of the boundaries, nor the quantity of land sold; it is left in blank. The defendant has endeavored to cure the defect by parol evidence, but parol evidence is inadmissible to complete the sale. The sale was not signed by all the parties; Antoine Mallet, the husband, did not authorize his wife. Troplong No. 48-9; 9 Touillier No. 460; 5 La. Rep. 460.

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VS.
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T. H. Lewis, for the defendant and appellee.

Morphy, J. delivered the opinion of the court.

The plaintiffs sued out an injunction to arrest the execution of an order of seizure and sale obtained by defendant, in the exercise of his privilege as vendor of a tract of land. After alleging various informalities in the executory proceedings, they aver that the deed of sale on which the order of seizure issued is incomplete and not valid in law, because it does not set forth the number of arpents in front and in depth, intended to be sold, nor the boundaries of the land; that the same have been left in blank so that they (the plaintiffs,) cannot set up any right or title to any definite price of property; that there has been no consent or agreement between them and defendant as to the quantity of land sold, the same not having been mentioned in the sale because it was unknown; that it was the duty of the vendor in order to make a delivery of the thing sold to cause a survey to be made, and the boundaries ascertained, so as to complete the sale and give them a title to a specific tract of ground; but that he refuses and neglects so to do. They pray that their injunction be made perpetual; that the sale may be cancelled, and that defendant may be decreed to reimburse to them the part of the price already paid, to wit: \$1800, with damages; and in case the sale be not cancelled,

WESTERN DIST. they pray that defendant be decreed to complete their title to
September, 1841. the land by filling up the blanks in the sale, after causing a
LABAUME ET AL. survey to be made at his expense, &c. The answer admits
vs. that in the notarial sale of defendant to plaintiffs, there was
DECLUVET. certain blanks left, because the parties did not know at the
time the exact distance from the Bayou Têche to a certain line
which had previously been agreed upon as the front line of the
portion of land thus sold; which blanks were to have been
filled at any subsequent time whenever the plaintiffs should
require it to be done. It avers that shortly after the execution
of the sale, the defendant and plaintiffs by mutual consent and
to save the expenses of a regular survey, called on one Mr.
Gonsoulin who had in his possession a surveyor's chain, and
got him to run out and mark the front and one side line of said
land at the place agreed upon; that the plaintiffs were then
and there put in actual possession of the plantation, declared
themselves perfectly satisfied with the same, and removed a
fence on their ground which they placed on the line as marked
out by Gonsoulin: and that ever since they have enjoyed,
claimed and possessed the same under and by virtue of said
sale. The answer concludes with a prayer, that in case the
order of seizure be set aside, judgment may be rendered in
solido against the plaintiffs for the balance of the price due to
defendant; and should the sale be cancelled, that damages be
awarded against the plaintiffs for the waste committed on the
property during their possession. The injunction staying the
executory proceedings was made perpetual, but the plaintiffs
were decreed to pay to defendant the balance due on the price
of the land, and the blanks in the authentic sale were decreed
to be filled up in conformity with a plat of survey made pur-
suant to a previous order of the court. The plaintiffs
appealed.

On the trial, the defendant offered in evidence a private act
of sale of the same property, executed between the same
parties a few days before the notarial one, and in which nat-
ural objects are mentioned, showing the front line agreed

upon, and the boundaries of the portion of land sold by defendant in the rear of a tract adjoining that occupied by himself, on the Bayou Têche. It was objected to on the ground that it made no part of the public act, that it was not binding on the parties who annulled it by passing a sale before the parish judge; that it was not signed by all the parties, and that it could not be used to vary, alter or even explain the public act; the judge admitted the paper in evidence, and we think correctly. Testimony to be sure could not have been heard to complete the sale by showing what was the thing sold, but we can see no valid objection to written evidence of the kind offered by defendant. Writing is indeed required in relation to the proof of the sale of an immoveable, but nothing renders it absolutely necessary that all the essentials necessary to constitute a sale should be evidenced by the same instrument. In the agreement or sale under private signature it is mentioned that an authentic act of sale shall be passed as soon as Mrs. Antoine Mallet shall have obtained her husband's authorization to make the contract. By the execution of a notarial deed before the parish judge, a few days after, the parties never contemplated that it should annul their previous agreement; their object on the contrary, was to confirm it by clothing it with more solemnity, and procuring the authorization of the husband of one of the purchasers who was a married woman. If, in the public act there be any omission, ambiguity or uncertainty, where can the intention of the contracting parties be more properly looked for than in the original agreement which such public act was intended to place among the records of the country? It is true that in the latter act the parties might by consent, have modified their first contract; in such a case, the last deed would undoubtedly have been the best and exclusive evidence of their agreement; but here there is no contradiction whatever between the two acts. The last one has only omitted to mention the distance from the Bayou Têche at which the division line was to exist between the portion of the land sold to plaintiffs in the rear,

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DECLOUTY.

Where there are ambiguities in the boundaries and corners of a tract of land in controversy between the defendant and plaintiffs, as vendor and vendees, occasioned by leaving blanks in the notarial act of sale, a private act previously executed between the same parties, will be received in evidence to explain and show the true boundaries and corners, when it is not inconsistent with the notarial act.

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LABAUVE ET AL.
VS.
DECLERET.

and the front part of it retained by the vendor; the first writing does not mention this distance neither, but it gives the means by which it can be ascertained. It provides that the front line of the portion sold in the rear shall begin at the corner (nearest to the Bayou,) of an orchard touching Broussard's land, and be drawn so as to strike the corner of the sugar house of the plantation, and be continued straight until it reaches the side line of the adjoining property of the vendor. When the purchasers seek to fly from their contract, on the ground that there has been no consent or agreement as to what portion of land was sold, we see no good reason why the vendor should not be permitted to invoke this private act.

Leaving out of view the testimony of the parish judge which was improperly admitted as to what was said or agreed to at the time of drawing up the notarial deed, it might readily be inferred from the subsequent acts and conduct of the parties that it was not from any uncertainty or ignorance about the place where the dividing line was to run that blanks were left in the authentic act. Shortly after its execution we find the plaintiffs assisting in an amicable survey of the land, placing their fence on the front line as staked out by themselves and calling on the judge to fill up these blanks. It is not shown that the defendant refused or was ever requested to join plaintiffs in completing the notarial sale. From the wording of this instrument, taken in connection with the private act, and the whole conduct of the parties, it is evident that fearing the natural objects referred to in their original agreement, should disappear and leave the boundary uncertain, the parties thought it more advisable to measure out the distance from the bayou to the point agreed upon, and designate it by such admeasurement. Upon the whole it appears to us that by ordering a regular survey to be made and the blanks in the sale to be filled up in conformity therewith, and decreeing thereupon the plaintiffs to pay the balance of the price, the judge below has satisfied the law and justice of this case.

It is therefore decreed that his judgment be affirmed with costs.

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BONNY & BAKER
vs.
BRASHEAR.

BONNY & BAKER vs. BRASHEAR.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT FOR THE PARISH OF
ST. MARY, THE JUDGE OF THE DISTRICT PRESIDING.

The obligation entered into by the principal and his surety, is not a joint one ; but on the contrary, each one is bound towards the creditors for the whole, although as between themselves, the entire is due by the principal, and can be recovered of him by the surety who pays.

A surety may be sued without his principal.

Where the curator fails to comply with his duties, and pay over money, any creditor of the estate may at once resort to his action on the curator's bond against the surety.

So where an estate is shown to be solvent, a creditor may sue the curator or his surety, on their bond, for the whole amount of the claim, without waiting for a distribution, when there is delay, or for other creditors to come in.

This is an action against the defendant as surety in a curator's bond. The plaintiffs allege, the late Wm. S. Barr was indebted to them \$604, for the amount of his promissory note, executed and payable the 31st March, 1832, with 5 per cent. per annum interest thereon until paid. That Barr died soon afterwards, and R. B. Brashear was appointed curator of his vacant estate, and gave bond for its faithful administration, with the defendant as security. They allege, that he has not faithfully administered said estate, or paid over the monies thereof; and that he has collected funds and failed to pay their debt, except about \$180, paid in 1833; and that both the curator and his surety are liable. They pray judgment against

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VS.
BRASHEAR.

the defendant, as surety in said bond, for the balance due them.

The defendant pleaded a peremptory exception; that the action could not be maintained until the estate was definitively settled; and that the Court of Probates alone could settle the same.

The defendant denied any mal-administration or forfeiture of the bond; and averred there would be funds sufficient to pay the plaintiffs' demand, when the estate was definitively settled.

The plaintiffs had judgment for \$251 31, with interest; and the defendant appealed.

Splane, for the plaintiffs.

Dwight, for the defendant and appellant, assigned as error; that the obligation sued on was *joint*, and all the co-obligors are not made parties to the suit.

Morphy, J. delivered the opinion of the court.

This action is brought against the defendant as surety on a bond, given by Robert B. Brashear, as curator of the vacant estate of Wm. S. Barr, bearing date the 30th of June, 1834. The plaintiffs, who seek to recover the amount of their claim against the succession, allege, that the said Robert B. Brashear has badly administered the said estate, and has paid to the creditors only a small portion of their claims; that the same was solvent, and six or seven thousand dollars would have been remaining after the payment of all the debts, had it been properly managed; that the curator has converted to his own use or otherwise improperly applied about twelve or fourteen thousand dollars, belonging to the estate, to the prejudice of the creditors; that the curator is now unable to pay the debts of the estate, in consequence of which the defendant, his surety, is legally bound to pay the same, and that the time allowed by law for the settlement of the estate has long since expired. The defendant alleges, that the plaintiffs cannot maintain the

present action, because they cannot have any recourse against him as the surety of the curator, until the estate is finally settled, and a definitive tableau of distribution filed; that the plaintiffs have no right of action, until the estate be settled contradictorily with the curator, in order to ascertain the situation of the same, and that it was the duty of plaintiffs, before bringing their action, to cause a liquidation of the estate to be made before the Court of Probates, as the District Court has no power to order one. He further denies the allegations in the petition, and avers, that the estate is fully sufficient to pay the debts, and that the curator has not been guilty of maladministration, as charged by the plaintiffs. There was a judgment below against defendant for the sum of two hundred and fifty-one dollars, and thirty-one cents, with five per cent. interest thereon, from the first day of June, 1832, until paid. The defendant appealed. In this court he has assigned as an error, apparent on the face of the record, that the obligation sued on is joint, and that all the obligors have not been made parties to this suit.

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vs.
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It is clear, that the obligation entered into by a principal and his surety, is not a joint obligation; they are not bound, like joint obligors, for a proportion of the debt; on the contrary, each is bound towards the creditor for the whole, but between themselves the entire debt is due by the principal, and can be recovered of him by the surety, if upon being sued he is compelled to pay it. La. Code, 2081, 3021. It has long since been settled, that a surety can be sued without his principal. 3 Martin, N. S., 574; 6 Idem, 395.

The obligation entered into by the principal and his surety, is not a joint one; but on the contrary, each one is bound towards the creditors for the whole, although, as between themselves the entire is due by the principal, and can be recovered of him by the surety who pays.

On the merits it appears, that in 1832 Robert B. Brashear was appointed curator to the estate of the late Wm. S. Barr; that the estate amounted to \$22,397 77; that he administered on the same during two years, and in June, 1834, having obtained a further prolongation of the curatorship, he subscribed with defendant the bond now put in suit. The condition of this bond is, that the curator shall "well and truly administer upon the estate, and faithfully execute and perform the duties

A surety may be sued without his principal.

WESTERN DIS. required of him by law, and shall account for and pay over all such sum or sums, as shall come into his hands, &c." From

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Where the
curator fails to
comply with his
duties, and pay
over money, any
creditor of the
estate may at
once resort to
his action on the
curator's bond
against the
surety.

the time he was continued in his trust, it is not shown, that he has complied with any of his duties as curator. The condition of his bond is therefore broken, and the surety is liable unto the creditors or other persons injured by such neglect of duty. The latter are not bound to sue the curator before the Court of Probates, but may resort at once to their action on the bond ; 5 Martin, 631 ; 11 La. Rep., 330. It is said, that there is error in the amount. which defendant is decreed to pay ; that from the evidence it will appear, that after deducting from the amount of the inventory the dividends already declared by the curator, and the notes and property which he surrendered up to F. J. Birdsall, his successor in office, there remains only a sum of \$4126 87 unaccounted for ; that the defendant should be decreed to pay to plaintiff only such a proportion of this fund as would have been accruing to him, had a distribution of it been made among all the creditors of the estate ; that if defendant is decreed to pay to each creditor, who sues him on his bond, the whole balance of his debt against the estate, he will be made to pay an amount much larger than the aforesaid sum of \$4126 87, for which alone the curator himself is responsible.

In no event can the defendant be held liable for more than the balance, whatever it may be, which is yet unaccounted for by his principal ; but it is by no means so clear, that he can insist on making a distribution of it among creditors who have not thought proper to hold him responsible on his bond. If the estate had been insolvent, it might have been a question of some difficulty and doubt ; but in the present case, the succession being admitted on all hands to be fully sufficient to pay its debts, no injury can result to the other creditors, by decreeing defendant to pay to the extent of his liability the claims of those creditors, who may sue him on his bond ; leaving the other creditors to seek their payment out of the funds in the hands of the new curator, or on the bond by him given, to secure his faithful administration. It appears to us, that the

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to come in.

proper course to be pursued, when a new curator is appointed to an estate, is for him to compel his predecessor to account to him for his administration, and to pay over and deliver to him all the funds and effects, which may have remained in his hands. This not having been done, and the plaintiff having exercised his individual right of suing on the bond, we cannot withhold from him the indemnity, which it was intended to secure to him in case the curator failed to comply with its conditions.

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BENOIT
vs.
BROUSSARD.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

BENOIT vs. BROUSSARD.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT FOR THE PARISH
OF LAFAYETTE, THE JUDGE THEREOF PRESIDING.

194 887
107 653

A third person who did not sign a notarial act of sale, although it expresses on its face, that the *price* was paid by the vendee, *in cash*, may show by parol evidence, that in fact it was paid partly in cash, which he advanced, and by his note for the balance.

This is an action by Carmelite E. Benoit, wife of T. Broussard; and formerly the wife of Arvillien Broussard, a deceased son of the defendant, to recover the amount alleged by her to be due from the estate of her late husband, which she inherited from her deceased son, born of that marriage. This claim is made up of several items, which are fully stated in the opinion of this court.

The general issue was pleaded, which put the plaintiff on the proof of her demand.

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vs.
BROUSSARD.

There was a provisional judgment, referring the case to the parish judge, to audit and state the accounts between the parties.

Final judgment was rendered, decreeing a balance due to the plaintiff on the accounts of \$478 23; and that she was entitled to one-fourth of the slaves Carmelite and her children, which were ordered to be sold, to effect a partition. The defendant appealed.

Voorhies, for the plaintiff.

Crow, for the defendant.

Garland, J. delivered the opinion of the court.

The plaintiff alleges, she is the late widow and heir, through her deceased son, Eloi Broussard, of Arvillien Broussard, deceased, who was a son of the defendant by his first wife. She says, defendant owes her the sum of \$608 93, which her late husband was entitled to receive from the estate of his mother, also the sum of \$64 40, which he was entitled to, as his portion in the succession of his deceased sister, and the further sum of \$1330 37, which was the amount the estate of Arvillien Broussard sold for at probate sale, which amount, it is alleged, was received by defendant as agent of the plaintiff. She also claims one-fourth of a female slave, named Carmelite, and her children, which her late husband also inherited from his aforesaid deceased sister.

The answer puts all these allegations at issue, and sets up a large claim in compensation and reconvention.

It is clearly established, that defendant was tutor of his children by his first wife, and that the share of each of the four heirs was \$608 93, which was in his hands; the property being adjudicated to him. It is further shown, that defendant received the slave Carmelite, and the sum of \$159 93, the amount of the succession of Azelie Broussard, his daughter, who died without children, of which slave and her increase the plaintiff is entitled to one-fourth part, as also of the money,

amounting to \$39 98. It also appears, the defendant was by Western Dis.
September, 1841.
 plaintiff appointed her agent, to settle the estate of her deceased husband, Arvillien Broussard, which amounted to \$1330 37, so that defendant has to account for \$1979 28, exclusive of the negro woman and children, about whom there is no complaint by either party in this court.

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 BROUSSARD.

To account for this sum, the defendant says and proves by the production of an act of sale from Alexis Dubon, to Arvillien Broussard, that he had purchased a tract of land on the bayou Vermillion for \$1000, which Dubon and his brother prove was paid by the defendant to the vendor. The plaintiff objected to this evidence on the ground, that it contradicted the act of sale, which stated the consideration was paid in cash by Arvillien Broussard, and that defendant was a party or privy to that act. The court sustained the objection, and the defendant excepted. The evidence of the Dubons is, that although the sale is said to have been for cash, in fact, defendant paid \$200 in cash at the time, and gave his note for \$800, payable in a year, which was subsequently paid. In the act of sale, it is stated, that Arvillien Broussard was a minor, emancipated by marriage, and that he is assisted in the transaction by his father, as curator *ad hoc*; but it appears from the record, defendant did not sign the act. The judge therefore erred in rejecting this testimony. Defendant was a third person in relation to this contract, and might very properly prove he furnished the money to purchase the land. That he did do so, we think is further proved from the circumstance of Arvillien being at the time under the age of majority, and but a short time married. It is not probable, that a minor in his situation would have \$1000 to invest in land. We therefore think, this sum should be allowed as a credit.

A third person who did not sign a notarial act of sale, although it expresses on its face, that the price was paid by the vendee, in cash, may show by parol evidence, that in fact it was paid partly in cash, which he advanced, and by his note for the balance.

The plaintiff purchased property at the sale of the estate of Arvillien Broussard to the amount of \$218 25, with which she is to be charged.

It is proved to our satisfaction, that defendant paid on account of his son's estate \$390 14. This is exclusive of \$140

WESTERN DIS. paid him, which it seems was coming from his grand-mother's *September, 1841.* estate.

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BROUSSARD.**

We also think the defendant is entitled to charge the plaintiff for the board of herself and child during two years she resided at his house, whilst a widow. It is proved, this is worth \$390, but as it is also in evidence, that some of plaintiff's beeves were killed for the use of the defendant, about half that sum we suppose to be just.

The account will therefore stand thus :

Whole amount to be accounted for, \$1,979 28

Deduct :

Amount paid Dubon for land, \$1,000 00

Purchases by plaintiff at the sale of Arvil-

lien Broussard, 218 25

Debts paid for his estate, 390 14

Board for plaintiff and child, 195 00

————— 1,803 39

Balance due plaintiff, \$175 89

As the judgment appealed from is for a larger amount than we think is owing, it must be reversed.

The judgment of the District Court is therefore annulled, avoided and reversed, except so far as it relates to the slaves Carmelite and her children, and proceeding to give such judgment on the other matters in controversy, as in our opinion ought to have been given in the court below : it is adjudged and decreed, the plaintiff do recover of the defendant the sum of one hundred and seventy-five dollars and eighty-nine cents, with interest thereon at the rate of five per cent. per annum, from the date of this judgment, to wit: the 29th September, 1841, until paid, the costs in the District Court to be paid by defendant, and those of the appeal to be paid by the plaintiff and appellee.

BRIANT vs. MARSH.

WESTERN DIS.
September, 1841.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, FOR THE PARISH OF
ST. MARTIN, THE JUDGE THEREOF PRESIDING.

BRIANT
vs.
MARSH.

Actual idiocy might, perhaps, be deemed a redhibitory vice in a slave; although not specially named in the code; but such a defect would be so apparent to an ordinary observer as to bring the case within the article 2497 of the La. Code.

When the testimony of the witnesses are contradictory and the evidence nearly balanced, the opinion of the judge *a quo* will have great weight.

This is an action on several promissory notes of the defendant claiming a balance as due thereon of \$2367 24, with ten per cent. interest.

The defendant admitted the execution of the notes and that he had paid \$1500 in a draft; leaving a balance of \$880 unpaid; that said notes were given for the price of two slaves who are liable to the redhibitory vice of runaways; and are so worthless that had he known it, he would not have purchased. He prays that the sale be cancelled and that the plaintiff be required to take said slaves back and pay him \$500 for medical attendance, expenses, &c., and return him his notes and draft; or if the sale is not cancelled that he be allowed a diminution of price as in case of *quantii minoris*, &c.

The district judge presiding was of opinion the plaintiff had fully made out his case and proved his demand, and that the defendant had failed in establishing his defence. There was judgment in favor of the plaintiff for \$880, with ten per cent. interest; being the balance due on the notes in suit. The defendant appealed.

Voorhies, for plaintiff.

Morse, for defendant.

1. This is an action of redhibition in the sale of slaves; the disease is proven to have existed within a few days after the sale, two physicians declare that it must have been constitu-

WESTERN DIS. tional, and five or six witnesses swear that the slave Mary Ann
September, 1841. is worth absolutely nothing.

BRIANT
vs.
MARSH.

2. The court erred in allowing the answer of Vincent Ternan to be read, he being one of the heirs of the estate whence the negroes came and really plaintiff in this cause.

Garland, J. delivered the opinion of the court.

The defendant being sued on several promissory notes, pleads a failure of consideration; they being given to secure the price of two slaves purchased by him at the sale of the succession of the late Madame Ternan. These slaves, he alleges, are in the habit of running away, and one of them is so deficient in intellect as to be nearly useless.

In the court below no evidence was offered to prove the slaves were *runaways*. As to the question of imbecility of one of the slaves, a number of witnesses were examined; among those on the part of defendant, were two physicians, who examined the girl, and were of opinion she had very little sense, so little, they stated, that they would not accept her as a gift. On the part of plaintiff, a number of witnesses testify that the girl has as much sense as persons of her condition ordinarily have. Some of these witnesses have known the girl for a number of years, and say they never observed or heard of her being an idiot or so entirely void of understanding as to be useless. The opinions of the witnesses vary widely, and from their respectability and number, the testimony is nearly balanced.

Actual idiocy might, perhaps, be deemed a redhibitory vice in a slave; altho' not specially named in the code; but such a defect would be so apparent to an ordinary observer as to bring the case within the article 2497 of the La. Code.

It is very difficult if not nearly impossible to fix a standard of intellect by which slaves are to be judged; hence we must adhere as closely as justice will permit, to the letter of the law, and not extend the cases of relative vices too far. Madness is an absolute redhibitory vice, and actual idiocy may perhaps be so considered, although not specially named; La. Code, art. 2502. But such a defect as that, would, we think, be so apparent to an ordinary observer, as to bring the case within the art. 2497 of the code.

When the facts detailed by witnesses are contradictory and the evidence nearly balanced, we always give much weight to the opinion of the judge who heard the witnesses and saw their manner of testifying. In this case his opinion is in favor of the plaintiff, and we do not see in it such error as to make our interference necessary.

The judgment of the District Court is therefore affirmed with costs.

WESTERN LIT.
September, 1841.

PARRY
vs.
HANNON.

When the testimony of the witnesses are contradictory and the evidence nearly balanced, the opinion of the judge *a quo* will have great weight.

PARRY vs. HANNON.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT FOR THE PARISH OF ST.

MARTIN, THE JUDGE OF THE SEVENTH PRESIDING.

The case depends entirely on facts and calculations made by auditors and the inferior court, which are approved and judgment affirmed.

This case grew out of a partnership in a small steamboat and joint ownership in a tract of land. The plaintiff and defendant being partners, a serious misunderstanding arose between them, and this suit was instituted to settle and dissolve the partnership affairs, and to recover any balance that may be found due the plaintiff.

The defendant pleaded the general issue, and claimed a large balance due to him.

When the cause was at issue it was sent before auditors who reported a balance for plaintiff, when after making deductions in favor of the defendant, there was a judgment for the plaintiff of \$240, with interest, &c. The defendant appealed.

Voorhies, for the plaintiff.

Morse & Magill, contra.

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September, 1841.

FERRY
vs.
HANTON.

Garland, J. delivered the opinion of the court.

The plaintiff and defendant were partners in a small steam-boat called the Alligator, and a small tract of land at the Grand Tour. A serious misunderstanding having taken place between them, the defendant left the boat, when the plaintiff commenced this suit for a settlement of the partnership and a partition of the property, to effect which a sale was made by consent of parties. All the accounts were also by consent submitted to auditors, who after a long examination made a report, stating a certain balance as owing from defendant to plaintiff, reserving a few specific items for the decision of the court, they involving some questions which the auditors did not undertake to decide. When the report was made, it is in evidence that both parties consented to it as far as it went, and the court decided on the points reserved, and materially reduced the amount found by the auditors. From this judgment the defendant appealed. In this court the plaintiff has prayed an amendment of the judgment alleging it is not for a sufficient amount.

The case depends entirely upon facts and calculations; we have given both an attentive examination and are unable to discover any error in the conclusions drawn from them by the auditors and court below.

The judgment of the District Court is therefore affirmed with costs.

BRASHEAR vs. CARLIN, CURATOR, &c.WESTERN DIS.
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APPEAL FROM THE COURT OF THE FIFTH DISTRICT FOR THE PARISH OF

ST. MARY, THE JUDGE OF THE SEVENTH PRESIDING.

BRASHEAR
vs.
CARLIN,
CURATOR, &c.

The surety cannot appeal from a judgment against him and his principal, which the latter has already had reversed on appeal. The release of the principal in the judgment, released the surety, although not a party to that appeal.

This is an appeal taken by the principal in an injunction bond. In the case of *McMillen vs. Carlin, curator, &c.*, there was judgment in the court below, dissolving the injunction, with damages, interest, &c., against the principal and his surety. On an appeal to the Supreme Court by *McMillen*, (*Brashear*, the surety, did not join in the appeal,) this judgment was reversed as to the damages, &c. See 16 La. Rep., 100-102. Before the year expired, *Brashear* also appealed from the same judgment.

T. H. Lewis, for the appellee, *Carlin*, moved to dismiss the appeal, on the ground that the appeal cannot be sustained; there being no judgment to appeal from.

Dwight, for the appellant, insisted that the judgment remained in force against the surety, and should be reversed.

Morphy, J. delivered the opinion of the court.

On the dissolution of an injunction sued out by the plaintiff, he and *Walter Brashear*, his surety on the bond, were decreed to pay damages. An appeal having been taken up by plaintiff, the judgment of the court below was reversed on the ground, that the other party having abandoned the executory process, and prayed for judgment against his debtor, as in an ordinary suit, damages had been wrongfully awarded against the plaintiff on the injunction bond. See 16 La. Rep., 101. *Brashear*, who did not join in that appeal, has brought up the present one from the same judgment. He is met in this court by a motion to dismiss his appeal as being taken from a decree, which was no longer in force. This motion must, in our

WESTERN DIS. opinion, prevail. It is obvious, that the judgment of the inferior court could not be reversed as to the principal debtor in

PATIN
vs.
BLAIZE, JR.

The surety cannot appeal from a judgment against him and his principal, which the latter has already had reversed on appeal. The release of the principal in the judgment, released the surety, although not a party to that appeal.

this case, and continue in force against the surety. The latter could not remain bound, after the former had been released ; although the surety had not joined in the appeal, the judgment rendered in this court enured to his benefit. The obligation of a surety is so dependant on that of the principal debtor, that he is considered in law as being the same party as the debtor in relation to whatever is adjudged, touching the obligation of the latter ; provided it be not on grounds personal to such principal debtor ; it is for this reason, that a judgment in favor of the principal debtor can be invoked as *res judicata* by the surety. 2 Pothier on oblig., 299.

It is therefore ordered, that this appeal be dismissed with costs.



PATIN vs. BLAIZE, Jr.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, FOR THE PARISH OF
ST. LANDRY, THE JUDGE OF THE SEVENTH PRESIDING.

The plaintiff is not bound to show a perfect title in order to recover against a trespasser without title, provided he has the actual possession. When a civil possession is relied on alone, the title must be *prima facie*, such as would be translativo of property.

It is essential to the validity of an entry that the land intended to be appropriated, should be so described as to give notice of the appropriation to subsequent locators.

The courts will not assess damages on a plea in re-convention, in a suit by injunction and sequestration. The party must take his remedy on the bonds given by the plaintiff in injunction.

Damages for the wrongful suing out an injunction may be claimed in the same suit, under the provisions of the act of 1831, in cases embraced by this act; but from its wording it seems to apply particularly where judgments are enjoined.

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September, 1841.

FATIN
VS.
BLAISE, JR.

This is an action of trespass claiming damages from the defendant, for cutting cypress and making *Pieux* on plaintiff's land.

The plaintiff alleges he is owner of 12 arpents front with the usual depth on the north side of the Bayou Plaquemine *Brulée*, the head waters of the river Mermentou, in the parish of St. Landry, and that the defendant has entered on said land without right or title, and between the months of May and August in the year 1839, cut down cypress trees and converted them to his own use, and committed various other acts of waste to his damage \$350. He prays for an injunction prohibiting the defendant from trespassing further on his land, and for \$350 in damages already suffered, and that the *Pieux* and timber cut down be sequestered.

The defendant pleaded a general denial; and averred that the injunction was wrongfully sued out; that he had been stopped in his business as a *Pieux* getter for more than twelve months, to his damage \$500. He prays that the injunction be dissolved with 10 per cent. interest, and 20 per cent. damages, on the amount of the bond against plaintiff and his surety.

Upon these pleadings and issues the cause was tried.

The plaintiff failed to make out his claim or title to the premises used and occupied by the defendant, or to show in any way that the latter was trespassing or occupying his land.

There was judgment dismissing the suit, from which the plaintiff appealed.

Crow, for the plaintiff and appellant.

T. H. Lewis, contra.

Garland, J. delivered the opinion of the court.

The plaintiff alleges he is the owner and proprietor of a

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tract of land "containing twelve arpents front, on the north side of the Bayou Plaquemine, of the head waters of the river Mermentou," and that he and those under whom he claims have had quiet possession of the same for more than thirty years. He further represents, that the defendant has gone upon the land, knowing the same to belong to him, and has committed various acts of trespass and waste by cutting down valuable cypress and other trees, making *Pieux* and boards thereof, and converting them to his own use, to his damage \$350. He prays for judgment for the damages, that an injunction may issue to restrain the defendant from proceeding in his waste and trespasses, and that the timber, *Pieux* and boards on the land be sequestered, the plaintiff claiming them as his property. These writs were accordingly issued.

The defendant denies the allegations in the petition, and further says, that by the suing out of the writs of injunction and sequestration he has been prevented from pursuing his business, which is that of a *lumber-man* and *Pieux getter*, for more than twelve months, to his damage \$500, which he claims in reconvention. He therefore prays for a dissolution of the injunction and sequestration, with ten per cent. interest, and twenty per cent. damages on the amount of the injunction and sequestration bond, both against the plaintiff and his surety, and the \$500 damages against the former.

It is not shown by the evidence that the plaintiff ever was in *actual* possession of the land on which it is shown the defendant committed the waste and trespasses alleged; nor does it appear that those under whom he claims have had *actual* possession for many years, though the original grantee, Pierre Guidry, had possession for a long time previous to his sale to Joseph Guidry. He sold a tract of land purporting to be the one in question to said Joseph, in the year 1823, who does not appear ever to have had actual possession; the heirs of the latter sold to plaintiff as is attempted to be shown.

The plaintiff, to show that he had a title to and civil possession of the land, by virtue of it, offered in evidence the *proces*

verbal of a probate sale of a portion of the succession of Joseph Guidry, made by the Judge of the parish of St. Landry, by which it appears the plaintiff purchased in 1837 a tract of land *having twelve arpents front by forty in depth, lying on the West bank of the East Fork of the Bayou Plaquemine Brulée, bounded on the upper side by land of Jean Mouton.* It is admitted that the East Fork of the Bayou Plaquemine Brulée is distant nine or ten miles from the place where the trespass was committed. The plaintiff then offered a sale made in 1823, from Pierre to Joseph Guidry, of a tract of land having twelve arpents front by forty deep, bounded on both sides by vacant land, "*face a la rive droite de la Rivière Mermentou.*" He then offered an inchoate title from the Spanish government, to Pierre Guidry, confirmed by the United States, for twelve arpents front on the *West Bank of the Bayou Plaquemine Brulée*, by forty in depth, bounded on each side by vacant lands, but lying opposite to a tract on the East side of the same Bayou, on which Pierre Guidry resided. On this land it is admitted the trespass was committed. The plaintiff further showed that this part of the *Plaquemine Brulée* was generally called the *Nementou*, it being within a few miles of the junction with that River (properly called Mermentou.) He further showed by the Register of the Land Office at Opelousas, that Pierre Guidry never had, as far as the records of his office showed, any other tract of land in that section of the parish of St. Landry, other than the two situated on the East and West banks of the *Plaquemine Brulée*, one owned now by Jean Mouton's heirs, and the other claimed by plaintiff. It is clearly shown by the surveys made by the United States, that the claim of Pierre Guidry is located on and covers the place where the trespass was committed, but the defendant says, that is not the tract of land purchased by plaintiff. He says the calls and boundaries in the sale from Joseph Guidry's heirs to plaintiff, are entirely different from those in the grant to Pierre Guidry, and widely different from those in the sale from Pierre to Joseph Guidry. He shows

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that the East Fork of the Plaquemine Brulée is a well known stream, and the parish surveyor testifies, if he had been called on to locate the claim of Pierre Guidry, he should not have placed it on that Bayou.

The plaintiff is not bound to show a perfect title in order to recover against a trespasser without title, provided he has the actual possession. When a civil possession is relied on alone, the title must be *prima facie*, such as would be translativ of property.

Upon this evidence, the question arises, is there sufficient certainty in the plaintiff's title to enable him to maintain this action. His counsel says he is not bound to show a title perfect in all respects to recover against a trespasser without title; this is true, if actual possession accompanies the apparent title; but when a civil possession is relied on alone, the title must at least be *prima facie*, such as would be translativ of property, and sustain a plea of prescription, if one were to be based on it.

Suppose the plaintiff were sued for the *locus in quo*, and should plead the prescription of ten years based on the sales from Pierre to Joseph Guidry, and from the latter to him (plaintiff,) we do not believe, as at present advised, the plea could be sustained.

We think there should be a reasonable certainty in the description of land when transferred, such as will enable a person by using reasonable care and diligence to find the particular place. If the description will suit another place better, or equally as well as the one claimed, it is defective.—1 Wheaton 130, 141; 3 Cond. Rep. 513, 520; 2 Wheaton 206; 4 Cond. Rep. 84. If the calls of an entry do not fully describe the land, but furnish enough to enable the court to complete the location by the application of admissible testimony, they will complete it, That is, if a tract of land have certain material calls sufficient to describe it, and other calls less material and incompatible with the essential calls, the latter may be disregarded—6 Cranch 148; 2 Cond. Rep. 336. If a great and prominent object, immoveable and durable in itself, and of general notoriety be called for in a location, that object must fix and locate the claim, although other minor and temporary objects, to be discovered only by a strict and successful search, might prove the locator really intended to take other land.—9

Cranch 164; 3 Cond. Rep. 331. It is essential to the validity of an entry, that the land intended to be appropriated should be so described as to give notice of the appropriation to subsequent locators.—2 Wheaton 206, 316; 4 Cond. Rep. 84, 132.

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A cabin and a marked tree in a country full of cabins and marked trees, cannot control a call made for an object of general notoriety.—9 Cranch 164. All of these decisions relate to original entries of land, but we think there should be nearly or quite as much certainty in sales as in original entries or purchases from the sovereign authority.

It is essential to the validity of an entry that the land intended to be appropriated, should be so described as to give notice of the appropriation to subsequent locators.

We suppose there is not a man in this section of country, if a sale for land lying on the West bank of the East Fork of Plaquemine Brulée, were exhibited to him, would thereby understand, it meant the land lay on the Plaquemine Bruléé so near the Mermentou River, as to induce a belief that a deed calling for the West bank of the Nementou included the land in question. The East Fork of the Plaquemine Brulée is well known; it is laid down on the maps of the State and in the public surveys. The Plaquemine Brulée is also well known, but if either Fork is entitled to the name the Bayou takes below the junction of the East and West Forks, it is the latter, as it is the longest and largest stream, and more generally spoken of as Plaquemine Brulée, than the other. We do not intend to be understood as holding, that if a title calls for a small or unknown stream, that it is to control the location, if there be other known boundaries to designate it better; in such a case they should be considered with cotemporaneous circumstances.

In this case we look upon the use of the name East Fork of Plaquemine Brulée as more specifically and particularly designating the place where the land sold should be, than if the name Plaquemine Brulée had been used in the general understanding of that name.

This cause has been twice tried in the District Court, and

WESTERN DIS. two judges have decided in favor of the defendant, we cannot September, 1841. say they erred.

HYDE ET AL.
vs.

BRASHEAR.

The defendant has asked us to assess the damages claimed in his plea of reconvention. This we cannot do in this action.

The courts will not assess damages on a plea in reconvention, in a suit by injunction and sequestration. The party must take his remedy on the bonds given by the plaintiff in injunction.

It was held in the case of *Morgan vs. Driggs, &c.*; 17 La. Rep. 176; that damages for the wrongful suing out of an injunction may be claimed in the same suit, under the provisions of the act of 1831, in cases embraced by it, but from its wording it seems to apply particularly where judgments are enjoined. The party must therefore take his remedy on the injunction or sequestration bond. Independent of this objection it does not appear the court below decided on the demand

Damages for the wrongful suing out of an injunction may be claimed in the same suit, under the provisions of the act of 1831, in cases embraced by this act; but from its wording it seems to apply particularly where judgments are enjoined.

in reconvention in any manner.

The judgment of the District Court is therefore affirmed with costs.

HYDE ET AL. vs. BRASHEAR.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, FOR THE PARISH OF ST.

MARY, THE JUDGE OF THE DISTRICT PRESIDING.

All the partners of a commercial firm must join in an action or an obligation due to the *partnership*; and on the dissolution of the partnership by the death of one of the partners, the surviving ones must join the representatives of the deceased, or obtain authority from the proper tribunal, before they can sue for a debt of the partnership.

The incapacity of surviving partners, to sue without obtaining authority or joining the representatives of the deceased, need not be specially denied. It may be assigned as error.

This is an action on a curator's bond, against the surety.

The plaintiffs, W. F. Hyde and E. D. Hyde, sue as the *surviving partners* of the late firm of W. F. & E. D. Hyde

& Co.; claiming the sum of \$543 63, due their said firm by the estate of R. S. Barr, deceased. They allege, the curator and his *surety* have become liable to pay said debt, and they pray judgment against the defendant as such surety.

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September, 1841.

HYDE ET AL.
VS.
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The defence was a general denial; and that the action could not be maintained until the estate of Barr was definitively settled, and a tableau of distribution filed and homologated; that there were funds sufficient to pay off the debts, when the estate shall have been finally settled.

On the trial the plaintiffs made proof of their claim, and showed the failure of the curator to pay over the funds, &c. There was judgment in their favor, and the defendant appealed.

Splane, for the plaintiff, urged the affirmance of the judgment.

Dwight, for defendant, assigned errors apparent in the record. *First*, that the plaintiffs could not sue as surviving partners, without joining the representatives of the deceased one, &c.

Morphy, J. delivered the opinion of the court.

The defendant who is sued as surety on a bond given by Robert B. Brashear, as curator of the estate of Wm. S. Barr, relies for the reversal of a judgment rendered against him on assignment of errors, apparent on the face of the record. Of these, we deem it necessary to notice only that which shows the want of capacity of the surviving partners of the firm of W. F. & E. D. Hyde & Co., to sue without joining the representatives of the deceased. In the case of *Crozier vs. Hodge*, 3 La. Rep., 357, we held, that "where the obligation is made to a commercial firm, the partners composing it must join in the action; for the debt is due to the partnership collectively, and not to one or other of the partners, as creditors *in solido*." On the dissolution of a partnership by the death of a partner, the surviving partners have no right to sue for the debts to the

All the partners of a commercial firm must join in an action, or an obligation due to the partnership; and on the dissolution of the partnership by the death of one of the partners, the surviving ones must join the representatives of the deceased, or obtain authority from the proper tribunal, before they can sue for a debt of the partnership.

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BABCOCK ET AL.
vs.

BRASHEAR.

The incapacity of surviving partners, to sue without obtaining authority or joining the representatives of the deceased, need not be specially denied. It may be assigned as error.

late firm, unless they obtain authority to do so from the proper tribunal, or be joined in the suit by the representatives of the estate of the deceased. 13 La. Rep., 484; 16 Idem, 31. It is said, that the capacity of the plaintiffs to sue, is not specially denied, and that the general issue does not put them on the proof of that capacity. We conceive, that in this case it is quite immaterial, whether their capacity be specially denied, or not, because they could not prove a capacity, which is denied to them by law. It would have been different, had they sued in a capacity susceptible of being proved, if specially denied. Under a general issue such capacity would have been considered as admitted. It appears to us, that this action is not maintainable.

It is therefore ordered, that the judgment of the District Court be annulled and reversed, and that there be judgment against the plaintiffs as in a case of non-suit, with costs in both courts.

BABCOCK ET AL. vs. BRASHEAR.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT FOR THE PARISH OF ST. MARY, THE JUDGE THEREOF PRESIDING.

The representatives of the deceased partner must be joined, or authority from the Court of Probates obtained, in a suit by the surviving partners, due the partnership.

This is an action against the surety in a curator's bond. The plaintiffs, Charles Gardiner and R. Watson, sue as the surviving partners of Babcock, Gardiner & Co., for a debt due said firm, from the estate of R. S. Barr, deceased, of which the

defendant's surety in the curator's bond. The plaintiffs allege said surety is liable for the mis-management of said estate by the curator, and they pray judgment for the amount of their claim.

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HARCOCK ET AL.
VS.
BRASHEAR.

The defendant pleaded the general issue, and set up some special matters in defence, but said nothing as to the capacity of the plaintiffs to sue. There was judgment for the plaintiffs, and the defendant appealed.

Splane, for the plaintiffs, insisted on the affirmance of the judgment.

Dwight, contra, assigned errors apparent on the face of the record; and one was, that the plaintiffs had no capacity to recover; having sued as the surviving partners, without joining the representatives of the deceased partner, &c.

Morphy, J. delivered the opinion of the court.

This case is not to be distinguished from that of *Hyde & Co. vs. Brashear*, this day decided; ante 402. It must be viewed as precisely similar to that case, and receive the same judgment.

It is therefore ordered, that the judgment of the District Court be annulled, avoided and reversed; and that there be judgment against the plaintiffs as in a case of non-suit, with costs in both courts.

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September, 1841.

COMEAU vs. FONTENOT.

COMEAU
vs.
FONTENOT.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT FOR THE PARISH OF

ST. LANDRY, THE JUDGE OF THE SEVENTH PRESIDING.

Property purchased during marriage by the husband, in his name, though bought with the funds of the wife, belongs to the community. So a slave received by the husband, in his own name, in discharge of a sum, which the wife inherited, is community property, as likewise her increase after the sale.

It has been held, that property acquired by the wife, as a *dation en paiement*, made to her by her tutor, and which never came under the administration of her husband, constitutes her separate or paraphernal property.

This is a suit for a separation of property, instituted by the wife against her husband.

She alleges, that during her marriage, among other property of hers, received by her husband, was a negro woman named Rose, which her husband received from her mother, who was owing her \$750. She further shows, that Rose has now seven children, and that they are all her paraphernal property; the mother being inherited by her and received by her husband, who had the administration of this and all her other paraphernal property. That his affairs are fast going to ruin, and he will squander and waste her property: Wherefore she prays for a judgment of separation of all her paraphernal property from that of her husband; and especially she claims Rose and all her children as such.

The defendant pleaded a general denial. The evidence showed, that the husband received Rose, and she was conveyed to him by a notarial act from the mother of plaintiff for the sum of \$750, due her as part of her inheritance. He had the administration of all the property as head of the community, and had actually sold one of the children of the slave Rose, born since the sale to him.

The plaintiff had judgment for \$894, and was declared separated in property from her husband; the court regarding

the slave Rose and her increase as community property. The plaintiff appealed. WESTERN DIS.
September, 1841.

Martin, for the plaintiff and appellant, contended, that the slave Rose was the separate property of the wife, having been received as a *dation en paiement* of her inheritance. 17 La. Rep., 295.

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VS.
FONTENOT.

T. H. & W. B. Lewis, for the defendant, maintained, that property purchased with the funds of the wife, belonged to the community, when it was acquired and administered by the husband. It is only, where the property is purchased with the funds and acquired by the wife, and when she administers it, that it is her separate paraphernalia. 10 La. Rep., 148, 172; 12 Idem, 170; La. Code, 2371.

Bullard, J. delivered the opinion of the court.

The question presented for our solution in this case is, whether the slave Rose and her children are the separate property of the plaintiff, or whether they belong to the community. The defendant received her in discharge of a sum of \$750, to which the wife was entitled by inheritance, and which sum formed consequently a part of her paraphernal property. The conveyance of the slave was to the husband, without the concurrence of the wife, and it appears, that he had the administration of her paraphernalia. Since the acquisition of her, she had several children, one of whom, it appears, has been alienated by the husband, and for whose value she also asks a judgment.

We cannot distinguish this case from that reported in the 10th La. Reports, 180, in which we held, that property purchased during the marriage by the husband, and in his name, though bought with the funds of the wife, belongs to the community. In the case of *Domingues vs. Lee et al.*, 17 La. Rep., 295, we ruled, it is true, that property acquired by the wife by a *dation en paiement*, made to her by her tutor, and

WESTERN DR.
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which never came under the husband's administration, still constitutes her separate or paraphernal property. The two cases are quite distinct. In the one the husband, employing a fund belonging to the wife, in the purchase of property in his own name, without her consent, becomes the owner as head of the community, and owes to his wife the amount thus employed. In the other the wife, who has retained the administration of her paraphernal property, employs it herself in the acquisition of other property, with his consent, or receives a *dation en paiement* from her own debtor. Such was also the case reported in the 1st La. Rep., 523, and in several others, to which our attention has been called by the defendant's counsel. We are by no means satisfied, that those judgments were erroneous. The contrary doctrine might lead to great injustice. Suppose, the slave Rose, purchased with the funds inherited by the wife, instead of becoming the mother of several children, had died? According to the argument of the plaintiff, this loss would have fallen upon her, although the purchase had been made, without her consent, by her husband, who had taken upon himself, and was responsible for the administration of her paraphernal estate.

It is therefore ordered and decreed that the judgment of the District Court be affirmed with costs.

**DELAHOUSSEYER'S HEIRS vs. DAVIS'S WIDOW AND
HEIRS.**

WRITTEN Dec.
September, 1841.

DELAHOUSSEYER'S
HEIRS
vs.
DAVIS'S WIDOW
AND HEIRS.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, FOR THE PARISH OF
ST. MARY, THE JUDGE OF THE SEVENTH PRESIDING.

Where land is alleged to have been conveyed with a view to give the vendee an apparent title, to enable him to recover in a petitory action; that the vendors were to have one-half when recovered; and that no price was really paid; such a stipulation can only be shown by counter-letter, and cannot be proved by parol evidence.

19	409
110	618
19	409
1122	793

A simulation not fraudulent cannot be proved by parol, as between the parties; and if fraudulent as to both parties, the law gives no action to enforce such contracts.

The plaintiffs allege that they are the heirs and legal representatives of Louis Peltier Delahoussaye, deceased, and as such are the real owners and proprietors of a tract of land situated at a place called "*Chicot Noir*," containing 60 arpents front on the bayou Têche, opposite Prevot's plantation, now in the possession and claimed by the heirs of Ramos Davis. They further allege that they derive title from the Spanish government, which has been recognized and confirmed by the government of the United States, and is in due form of law. They further show that the defendants are absentees, and pray that a *curator ad hoc* be appointed to represent them; and that a judgment be rendered inhibiting said defendants from setting up any title to said land.

In an amended petition the plaintiffs set out certain collusive and fraudulent transactions between the said Ramos Davis and James L. Johnson, a surveyor, by means of which the ancestor of these plaintiffs was induced to make certain sales of the land in question, and under which the defendants claim to hold; but which these petitioners allege to be null and void, as having been made and procured through the fraudulent conduct of said Davis and Johnson. They pray that Johnson's administrator be made a party, and that all these sales be annulled and the land restored to plaintiffs.

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DELAHOUSSAYE'S
HEIRS
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AND HEIRS.

The *curator ad hoc* pleaded a general denial on the part of the defendants, both to the original and amended petitions; and averred that the defendants claimed the land in contest by good and valid titles in virtue of sales made to them by the original proprietors; and prayed that they be quieted in the possession and enjoyment of said land.

Upon these pleadings and issues the cause was tried.

The plaintiffs offered to prove by witnesses the simulation, fraud and collusion alleged; which testimony was rejected on the opposition of defendants' counsel as inadmissible, and a bill of exceptions taken. The defendants produced titles, legal in their form, in support of their claim to the land in contest.

On the testimony adduced, the judge presiding was clearly of opinion the defendant made out a good title and gave judgment in their favor. From this judgment the plaintiffs appealed.

Voorhies, for the plaintiffs and appellants.

Maskell & T. H. Lewis, for the appellees.

Bullard, J. delivered the opinion of the court.

The plaintiffs in their original petition assert title in themselves as heirs of L. P. Delahoussaye to a tract of land on the Têche, commonly called the *Chicot Noir*, long in controversy between the ancestor of the defendants, and the heirs of Prevost; see 12 Martin, 445; 1 Martin, N. S., 650; and which he ultimately recovered by a judgment of this court. An answer was filed setting up title in the defendants. After the suit had been pending more than two years, the plaintiffs filed a supplemental petition in which they allege that the acts of alienation of said land executed by them and their ancestor in favor of the defendants are null and not obligatory. That it is true that as long ago as 1817, they appear to have sold and conveyed to Dr. Ramos Davis, a part if not the whole of said tract of land, but that they have lately discovered, that the said deeds of sale were obtained from them and their ancestor by

fraudulent means used and false representations made by Davis in conjunction with James L. Johnson. The fraudulent means used are stated to be that Davis called on them in January, 1817, and informed them that he had found certain titles to the tract of land which belonged to the petitioners, but would not disclose where they were unless the plaintiffs would convey to him one-half; the conditions to be expressed in the deed to be that \$3500 was the price, although nothing was to be paid. That they offered said Davis one thousand dollars if he would disclose to them where the titles could be found, but he refused and for fear of losing all they consented to convey one-half. That afterwards the said Davis called on them again to pass another act of sale, the price of which should appear to be \$8000, instead of \$3500, so as to show that he had paid an adequate price. That they repeated their offer of \$1000 for a disclosure of the titles, and they finally consented to pass the act, which, for these reasons is fraudulent and void. They further represent that sometime afterwards in collusion with James L. Johnson, and falsely and fraudulently represented that intending to bring a suit for the land, which suit, he alleged could not be brought in the plaintiffs' names, that it would be proper for them and their ancestor to pass another transfer of the balance of the tract in order to enable him to recover the whole tract, one-half of which, if recovered, should be for the benefit of the plaintiffs. Whereupon they executed the deed and nothing was paid. The representatives of Johnson were made parties, it being alleged that a part of the tract of land had been conveyed to James L. Johnson, who was *particeps fraudis*. The plaintiffs pray that these sales may be declared null and void, and that the whole tract may be decreed to them.

There was judgment for the defendants and the plaintiffs appealed.

The case is before us upon a bill of exceptions, from which it appears that the court rejected parol evidence to prove the facts set forth in the petition and supplemental petition, which

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DELANOUMATE'S
HEIRS
VS.
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WESTERN DRY are substantially set forth above. The court, in our opinion, *September, 1841.* did not err. As it relates to the half of the land first conveyed,

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HEIRS**

vs.

**DAVIS'S WIDOW
AND HEIRS.**

Where land is alleged to have been conveyed with a view to give the vendee an apparent title to enable him to recover in a petitory action; that the vendors were to have one-half when recovered; and that no price was really paid; such a stipulation can only be shown by counter-letter, and cannot be proved by parol evidence. one-half of their land, in order to recover the evidence of title to the other half, they may have made a foolish bargain, but they come with a bad grace, twenty years afterwards, when their title thus conveyed had been declared valid, to complain that they had been deceived and that nothing was paid them, and to recover back the land, which after a protracted litigation had been recovered by their vendee. As it relates to the other half, afterwards conveyed, it is enough to remark that if it was conveyed for the legitimate purpose of giving to Davis an apparent title, upon which he could maintain a petitory action, with an understanding that one-half was after recovery to be re-conveyed to the plaintiffs, and that no price really was paid; such stipulations between the parties can only be shown by counter letter, and cannot be proved by parol.

A simulation not fraudulent cannot be proved by parol, as between the parties; and if fraudulent as to both parties, the law gives no action to enforce such contracts.

A simulation not fraudulent cannot be proved by parol as between the parties, and if fraudulent as to both parties, still less; for the law gives no action to enforce such contracts. Whether the agreement therefore which invested Davis with the title to the other half of the tract was or was not fraudulent, parol evidence was equally inadmissible and was properly excluded.

The judgment of the District Court is therefore affirmed with costs.

ARIAIL vs. FENWICK.

WESTERN DIS.
September, 1841.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, FOR THE PARISH OF
ST. MARTIN, THE JUDGE OF THE SEVENTH PRESIDING.

ARIAIL
vs.
FENWICK.

The plea of prescription of one year is not applicable to a workman's account, for work done by the job, and materials furnished, whether it be under a specific agreement or on a *quantum meruit*.

This is an action on a mechanic's account for the sum of \$427 50, for work done on defendant's house, according to a detailed account annexed.

The defendant admitted, the plaintiff had done work on his house as a carpenter, but denied he was entitled to the amount he claimed; and that he had been more than fully paid. He specified payments to the amount of \$145; and pleaded prescription of one year against the account.

The plaintiff proved his account, which, after deducting credits, amounted to \$321, for which he had judgment. The defendant appealed.

Morse, for the plaintiff.

Voorhies, for the defendant.

Morphy, J. delivered the opinion of the court.

This suit is brought on an open account for work and labor done, and materials furnished for a house, belonging to the defendant. The latter pleads the prescription of one year, under article 3499 of the Louisiana Code. This plea cannot avail him. It applies only to the wages due to workmen, laborers, and servants, who are employed by the day or by the month; not to a claim for the value of certain pieces of work done by the job, and materials furnished, whether it be under a specific agreement, or on a *quantum meruit*. 1 La. Rep., 268; 10 Idem, 236.

On the merits, the judgment complained of is not so manifestly erroneous as to make it our duty to disturb it.

It is therefore affirmed with costs.

CASES IN THE SUPREME COURT

WESTERN DIS.
September, 1841.

CLEAVELAND vs. MAYO ET UX.

CLEAVELAND
vs.
MAYO ET UX.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT FOR THE PARISH
OF ST. LANDRY, THE JUDGE THEREOF PRESIDING.

The father or mother of a minor, or person in whose charge the minor is left, are responsible for the injury he may do to another; but this responsibility is based on the ground that the person having control of him could have prevented the act and did not; and is responsible for neglect.

But where a person, having control of a minor, causes or commands him to commit a crime, or an act causing damage and injury to another, such person is responsible as having committed the offence, although an irresponsible person has been interposed.

Persons responsible for a trespass or injury in different capacities need not be joined in the same action, although if liable in the same way, all must be joined as in a joint action.

This is an action against the defendant and wife for damages occasioned the plaintiff by shooting at and wounding him. The petition alleges that the defendant's wife caused her brother, a minor, named John Smith, to fire a gun at the plaintiff, without any provocation, wounding him with several shot in one of his eyes and elsewhere, so that he has been unable to work at his trade; being that of a shoemaker, and on which his means of support depended. He expressly alleges that the wife of defendant is liable for the injury and damage he has sustained, by instigating and ordering her minor brother to fire the gun at him. He prays judgment against the husband and wife for \$5000 in damages.

The defendants pleaded the general issue; and averred that in the absence of the husband on business, she had been repeatedly alarmed by riotous and disorderly persons infesting the place, and loitering about the premises, sometimes destroying the fencing, to the great alarm and injury of the defendant and his wife. That if plaintiff had received any injury for which they were liable, he had been fully compensated therefor, in acts of charity and kindness for the injury of which he complains. They pray that the plaintiff's demand be rejected and suit dismissed.

Upon these issues the case was tried before the court and a jury. WESTERN DIS.
September, 1841.

The substance of the evidence is, that at the time and night referred to, captain Mayo was absent, and his wife being repeatedly alarmed by disorderly and riotous persons about the place, sometimes pulled down the fences, she discovered the plaintiff in a sitting position outside of her fence, called to her young brother, who was asleep, and ordered him to shoot off the gun, and he fired it in the direction of the plaintiff. It was in proof that 16 small shot struck him, and that one of them hit him in the eye, and deprived him of the sight of it.

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vs.
MAYO ET UX.

On the part of the defendant, the lad, who shot off the gun, testified that he fired with a view only to frighten and alarm those who might attempt to break into the inclosure of the defendants.

There was a verdict, on all the evidence, of \$250 in favor of the plaintiff, and the defendants appealed from the judgment rendered thereon.

T. H. & W. B. Lewis, for the plaintiff.

Voorhies & Splane, for the defendants.

Garland, J. delivered the opinion of the court.

This suit is brought against the husband and wife, to recover damages in consequence of the plaintiff being shot at and severely wounded by one John Smith, jr., a minor, who fired the gun at the instance of, and under the express orders of the wife, the husband being absent. The damages are laid at \$5000.

The answers of Mayo and wife, after a general denial, state, that the former was frequently from home, being a captain of a steamboat; that the village in which they resided, was infested by many disorderly and riotous persons, who frequently loitered around their premises, breaking down the enclosures,

WESTERN DIS. and kept Mrs. Mayo in a state of constant apprehension for the safety of herself, children and property. They deny any malicious intent, and say, if the plaintiff has sustained any damage, he has been compensated by the many acts of charity and kindness of defendants towards him since the injury, of which he complains.

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VS.

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The evidence shows, that in July, 1889, between the hours of ten and eleven o'clock at night, the plaintiff, who is an inoffensive old man, was discovered by Mrs. Mayo in the street, near her house, in a sitting posture on the banquette or sidewalk. The moon was shining, so that objects could be plainly seen at a considerable distance. Mrs. Mayo awoke her brother, John Smith, jr., and directed him to get a gun that was loaded, and discharge it at plaintiff. He did so at and by her command, without saying any thing to plaintiff, or making any inquiry of him, as to his purpose or business at that place, by which he was severely wounded, and has entirely lost the sight of one eye, and had the other injured. The plaintiff is a shoemaker, dependent on his labor for support. He was confined for several weeks by the injuries he received, but during the whole time was treated with much kindness by both defendants, who were anxious to take him to their house, that they might attend him. They expressed great regret for the occurrence, and Captain Mayo paid a considerable share, if not all the expenses of plaintiff whilst confined.

The jury found a verdict for \$250 against Mrs. Mayo alone, upon which the court rendered judgment; and from which she, with the consent of her husband, appealed.

In this court the plaintiff relies upon articles 2294, 2304 and 2297 of the Code, to sustain his action, in which is embodied the doctrine, that every act, which causes damage to another, is to be repaired by the person, through whose fault it happened, whether that act be committed by himself or another.

The defendants contend, this action cannot be maintained:

1. Because the husband is not responsible for the acts of his wife during his absence from home. This doctrine we are not

prepared to admit as correct, though it is not necessary to decide upon it now, as the judgment and verdict are only against the wife, without deciding upon the responsibility of the husband.

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2. Because they say, if the plaintiff is entitled to recover any thing, he must sue the father of the minor, John Smith, jr., and he has his recourse against them, if the plaintiff should recover any thing. To sustain this position, they rely upon the fact, that young Smith was residing with his sister, by his father's consent, and the application of articles 2296-2297, which they say makes the father, and in the event of his death, the mother responsible for the acts of the minor. It may possibly be true, that the father is responsible in this case, for the acts of his minor son, but it does not follow, that the defendant is not also responsible for the injuries, she has caused the minor to commit. When a minor, of his own volition or accord, does an act that causes damage to another, the father or mother is responsible under the articles of the Code just cited, and the person in whose charge the minor is left, is responsible to them. This responsibility is based upon the supposition, that the person having the control of the minor, should or could have prevented the act, and not having done so, is responsible for negligence and imprudence. But the case is altogether different, when the person having the control, causes or commands the minor to commit a crime or an act, that causes damage to another. Then the party is responsible as having committed the offence, although an irresponsible person has been employed. A different doctrine will open the way to the commission of serious offences and injuries, without adequate responsibility attaching.

The father or mother of a minor, or person in whose charge the minor is left, are responsible for the injury he may do to another; but this responsibility is based on the ground that the person having control of him could have prevented the act and did not; and is responsible for neglect.

But where a person, having control of a minor, causes or commands him to commit a crime, or an act causing damage and injury to another, such person is responsible as having committed the offence, although an irresponsible person has been interposed.

Persons responsible for a trespass or injury in different capacities, need not be joined in the same action, although if liable in the same way, all must be joined as in a joint action.

3. It is contended the action cannot be maintained, because the father of the minor, and the minor himself are not joined in it, as they are jointly responsible under the article 2304. In reply to this, we say, the minor cannot be made responsible by a direct action, and if the father is responsible at all, there is no privity between him and Mrs. Mayo. He did not assist

WESTERN DIS. in or encourage the offence, whilst the other is a direct actor.
September, 1841.

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VS.
DUPERRIER
ET AL.

This distinguishes this case from that of Laussade vs. Hartineau, 16 La. Rep.

The judgment of the District Court is therefore affirmed with costs.

RIGGS vs. DUPERRIER ET AL.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, FOR THE PARISH OF

ST. MARTIN, THE JUDGE OF THE SEVENTH PRESIDING.

Where the evidence establishes the existence of a redhibitory disease at the time of sale, although not perceptible to ordinary observers, or known to the vendors; yet it is sufficient to authorize a rescission of the sale and return of the price.

Where the quantum of damages is not proved or is left doubtful, the case will be remanded to ascertain them.

This is a redhibitory action, to recover back the notes or price of a negress, which the defendants caused to be sold at public auction, and was purchased by the plaintiff, at the price of \$600. He expressly avers, that at the time of said sale, the negress was afflicted with an incurable disease, called a cancer in the womb, of which complaint she shortly after died. He prays, that the sale be rescinded, and that his notes be given up and cancelled, and that he have judgment for damages, &c.

The defendants, Duperrier and Segura, the vendors of said negress, denied the existence of the redhibitory disease at the time of sale, or that they were bound to return the price, &c. They further aver, they proposed about three weeks after the sale, to take back this woman, when the plaintiff complained of

her being diseased ; and that, if when she was properly treated, the disease proved bad, that then they would cancel the sale ; but the plaintiff refused. They pray, that the demand of plaintiff be rejected ; that they have judgment for the instalment of the price now due, in reconvention.

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RECORDED
IN
DUPERRIER
ET AL.

The redhibitory disease was proved to the satisfaction of the judge, who gave judgment rescinding the sale, and for the return of plaintiff's notes or the price. The defendants appealed.

Splane, for the plaintiff.

Voorhies, contra.

Garland, J. delivered the opinion of the court.

This is an action to rescind the sale of a female slave sold by the defendants to the plaintiff, on the ground of her being afflicted with an incurable disease ; also to compel the surrender of three notes amounting to \$600, which were given to secure the price, and for damages sustained by the employment of physicians to attend the woman, and trouble and expenses incurred during her illness. The answer puts all the allegations at issue.

It is shown, that the sale was made on the 24th of February, 1838. About two weeks after, the plaintiff ascertained, the woman was very ill and almost useless, and told a witness, if he chose, he might take her for her services ; he did so ; but in a few days after he returned her to plaintiff, as he would not keep her. The plaintiff, about this time, called on one of the defendants, to take the slave back again, who replied, he could not until he consulted his partner, Duperrier. On the 14th of March, 1838, the plaintiff placed the woman under the care of a physician, where she remained until the 25th of May, without any improvement in her health. During this time, another physician was called in, who visited the woman a few times ; a critical examination was made by both physi-

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September, 1841.

RISES
vs.
DUFFENRIE
ET AL.

cians, who concur in saying, she had a cancer in the womb, which, in their opinion, had existed for a year or more, and was incurable: The woman died in a short time after she was taken from under the care of the physicians. In behalf of the defendants several witnesses swear, they had known the woman for a long time, and did not know of her having any particular disease. She worked on the plantation of defendants as the other slaves, and in the swamp the year previous to the sale. One witness, who had acted as overseer on defendants' plantation, says, he did not know she was diseased, and other neighbors testified to the same thing.

Upon this evidence we cannot doubt, that the woman was diseased at the time of the sale. Two physicians examined her in a month or six weeks after, and say positively, she had a cancer in the womb, of long standing, which at the time was much advanced and incurable, and she died in three or four months after she was sold. The testimony on the part of defendants is negative only, and scarcely that. They say, they did not know of any disease the woman had, though they saw her frequently, and one of them had had her in his possession some two or three months before the sale, and observed no disease. This may all be very true, and probably is so, but it is not shown, the witnesses gave any particular attention to the state of the woman's health, and from the character of the disease it is not probable, she would disclose it to white men, as long as she could help it, unless it was to her owners. The physicians say, the symptoms are not very perceptible in the incipient stages of the disease, except to an experienced observer. The judgment cancelling the sale and decreeing a surrender of the notes, is perfectly correct.

As to the damages, the plaintiff has failed to prove what they amount to. It is not shown, the defendants acted in bad faith in selling the slave, or that they knew of her being afflicted with an incurable disease. The physicians say, they

charge plaintiff \$315 for their services, which they expect him to pay them, but he has not yet paid that amount or any other; on the contrary, it was admitted in the argument, that one or both of the doctors had sued the plaintiff for their accounts, and he was contesting with them the justice or reasonableness of their demands. It is not proved their services were worth the sum charged, further than the statement of Doctor Nabonne as to his claim for \$55. It may be, that the plaintiff may not be condemned to pay the sums charged, and if not, he is not entitled to recover them from the defendants. In this state of the case, the judgment as to damages must be reversed, and the cause remanded to ascertain them.

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September, 1841.

RIGGS
vs.
DUPERIER
ET AL.

Where the quantum of damages is not proved or is left doubtful, the case will be remanded to ascertain them.

The judgment of the District Court is therefore affirmed so far as it relates to the annulment of the sale from defendants to plaintiff; but so far as it relates to the damages, it is annulled and reversed, and the cause remanded for the purpose of ascertaining and fixing the amount; the costs in the District Court, up to the date of the appeal, to be paid by the defendants, those of this court to be paid by the plaintiff, and those incurred after the transmission of this judgment to the District Court, to abide the final decision of the case.

CASES IN THE SUPREME COURT

WESTERN DIS.
September, 1841.

PREJEAN vs. GIROIR ET AL.

PREJEAN

vs.

GIROIR ET AL.

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APPEAL FROM THE COURT OF THE FIFTH DISTRICT FOR THE PARISH OF

LAFAYETTE, THE JUDGE THEREOF PRESIDING.

Where a tract of land is sold as "*4 arpents front with about 35 or 40 in depth,*" the front to begin at a certain point, and the tract *bounded on both sides by plantations*, it is a sale *per overensionem*; and the boundaries will control the enumeration of quantity.

This is an action to recover about 40 superficial arpents of land, which the plaintiff alleges the defendant, Pierre Giroir, has taken from one side of his tract, by surveying it off, and planting posts to his damage \$1000. He further says, he purchased his tract of 4 arpents front by about 35 or 40 in depth from the heirs of Marguerite Richard, deceased, at the probate sale of her estate, and they are bound to make good this quantity.

The defendant opposed a general denial, and set up a valid and complete title to all the land he claimed. The heirs of Madame Richard, called in warrantee, denied that the plaintiff was evicted or disturbed in the possession of the land they sold to him and that he was put in the possession of the land as sold.

There was a verdict and judgment for the defendant; but against Richard's heirs, annulling the sale, and for the return of the price, (\$1030). The warrantors appealed.

Neveu, for the plaintiff.

Voorhies, for the warrantors and appellants.

Morphy, J. delivered the opinion of the court.

Plaintiff having been, as he alleges, dispossessed by Pierre Giroir of a part of a tract of four arpents front purchased from the heirs of the late Marguerite Richard, brought the present suit to recover the same, and cited in warranty his vendors. He prays that in case he should be finally evicted of any por-

tion of the said tract the sale be rescinded, and his vendors decreed to pay him \$1000 damages, &c. The defendant denies having ever taken possession of any land belonging to plaintiff, sets up title to the portion of ground claimed by him and pleads the prescription of ten, twenty and thirty years. The answer of the warrantors avers, in substance, that the plaintiff has always been and is still in the peaceable, quiet and undisturbed possession of the land really sold to him, and that no part of it has ever been claimed or taken possession of by his neighbor, Giroir; that the heirs of Marguerite Richard sold and delivered to him a certain tract of land within specific boundaries; that if within those boundaries there is a smaller quantity of land than that mentioned in his deed of sale he has no right to complain; that this suit, although it purports to be an action in warranty, is in truth and in fact brought to obtain a rescission of the sale, or a diminution of the price for a pretended deficiency in the quantity of land he purchased, and that such a claim is barred by prescription.

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FREJEAN
VS.
GIROIR ET AL.

There was a judgment below for defendant against the plaintiff; and one for plaintiff against his warrantors. The latter appealed.

From a survey made shortly after the sale to plaintiff, it was found that the tract contained only three arpents and a half instead of the four mentioned in his deed of sale; if he was entitled to no more he has suffered no eviction.

The description of the land as purchased by plaintiff at the sale of the succession of the late Marguerite Richard in 1820, is as follows, to wit: "One tract of land lying situate in the parish of St. Martin, at *Cote Gelée*, containing four arpents in front, with the depth that may be about thirty-five or forty arpents; the front of the said tract beginning at the extremity of the land of Pierre Giroir, bounded on the one side by the lands of Baptiste Comeaux and on the other side by the lands of Madame Clark Beaton," (since Pierre Giroir,) &c.

Where a tract of land is sold as "4 arpents front with about 35 or 40 in depth;" the front to begin at a certain point, and the tract bounded on both sides by plantations, it is a sale *per aversionem*, and the boundaries will control the enumeration of quantity.

This sale is clearly one *per aversionem*. We have repeat-

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edly held that where a sale is made with reference to known and definite boundaries they will control the enumeration as to quantity; that nothing more is intended to be conveyed than what is contained between the two given boundaries, and that a deficiency in the quantity does not entitle the purchaser to demand either a rescission of the sale or a diminution of the price; 5 Martin, N. S., 241; 8 Idem, 159; 3 La. Rep., 91; 7 Idem, 455; 16 Idem, 186. But it is argued that the intention and subsequent acts of the sellers must control the expressions in the act of adjudication, and that as they took upon themselves to deliver four arpents of land, they are responsible in warranty to the plaintiff for the half of an arpent belonging to Giroir, of which plaintiff has been dispossessed. It appears that about the time the price became due, the plaintiff required the land to be surveyed and delivered to him; that in the presence of two of the heirs a surveyor measured off the front of the tract, beginning at the boundary of Comeaux and running to that of Clark Beaton (Giroir), upon reaching which he found only three and a half arpents; the plaintiff then refused to accept the land saying that there was not the four arpents he had bought; he told them, "give me the quantity and I will pay you;" the heirs desired him to accept of this land as it was, and upon his refusal to do so, a witness says, *they measured across the line said to be Mrs. Clark (Giroir)*, until they made out the four arpents front, planted a post and delivered it in this manner. It is difficult to believe that the plaintiff could have persuaded himself that he had thus acquired any right or title to land which he knew did not belong to his vendors, and which therefore they could not deliver to him, but whatever may have been his belief on this subject, and the motive of the two heirs in acting as they did, it is clear that the parties were not aware that their rights were definitively fixed and determined by the adjudication; and that by law the tradition or delivery of the land accompanied the public act of sale. Had the plaintiff upon discovering the deficiency, absolutely refused to pay, he could under his sale have been com-

pelled to give the whole price, and in like manner had the surveyor found between the boundaries mentioned more than four arpents, the plaintiff would have been entitled to the surplus without having to pay any supplement of price; 2 La. Rep., 499; Marigay vs. Nivet et al. The plaintiff has then suffered no eviction, and the half arpent of which he pretends to have been dispossessed by defendant, never belonged to him or his vendors.

WESTERN DEL.
September, 1843

HISEM
vs.
LEMELE'S
CURATOR.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court in favor of plaintiff against the heirs of Marguerite Richard be annulled, avoided and reversed; and that there be judgment in favor of the said heirs with costs in both courts.

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HISEM vs. LEMEL'S CURATOR.

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF ST. MARY.

The fee of the attorney of absent heirs is properly chargeable to the share of the estate coming to them.

The cost of erecting tombs over the grave of the deceased, forms no part of the funeral expenses, and the curator has no authority to expend the means of the estate for this purpose without the consent of the heir.

Where the curator, in compliance with a verbal request of the deceased in his last sickness, and with the implied assent of the heir, erects tombs over the deceased and his wife, he will be allowed the sum expended, in his account against the estate.

This case comes up on an opposition filed by the plaintiff to sundry items in the account of the curator of John Lemel, deceased.

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HISEN
VS.
LEMEL'S
CURATOR.

The curator having filed his account and a tableau of distribution of the funds of the estate of the deceased, and the plaintiff who is heir for one half in right of his deceased daughter, made opposition to several items in the tableau, and prayed that it be amended in his favor. The items of opposition are stated in the opinion of this court, and need not be recapitulated.

The plaintiff's daughter was married to the deceased, Lemel, and died a few days before him, during the epidemic of 1839, in the town of Franklin, parish of St. Mary. A community of property existed between the spouses, and the plaintiff inherited his daughter's portion.

The evidence showed, that in his last sickness, the deceased requested of the present curator, that in the event of his death, he would cause tombs to be erected over the graves of himself and wife. After the appointment of Martin, as curator, he had tombs erected over the graves, and a paling made around them. This item of expense amounting to \$150, was charged to the estate, and is opposed by the father-in-law and heir of his daughter.

There was judgment sustaining the opposition to this item, and to an item of \$20 for fee of attorney of absent heirs; to a charge of \$46, amount of daughter's property sold to plaintiff, and charged to him; and also to a charge of \$135 for boarding plaintiff three months, which was rejected. The tableau was amended accordingly, and the curator appealed.

Maskell, for the plaintiff in opposition.

Splane, contra.

Bullard, J. delivered the opinion of the court.

The curator of the vacant estate of one Lemel, is appellant from a judgment sustaining in part an opposition, on the part of one of the heirs, to several items in his account rendered and tableau of distribution. The items opposed consist, 1st. Of a sum of \$114 35, for a coffin and paling round the grave

of the deceased and his wife, the daughter of the opponent. **WESTERN DIS.**
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 3d. For tombs erected over their graves in the open prairie, \$150. 3d. The small sum of \$10 56½ for trimmings of the coffin of the opponent's daughter, who died a few days before her husband, Lemel. 4th. The fee of the attorney of absent heirs; and, 5th. An account of A. Stubus for \$106. He further objects to the amount of board charged to the opponent, and to \$46, the proceeds of certain furniture received by him.

ESTATE
 OF
 LEMEL'S
 CURATOR.

We concur in opinion with the Court of Probates, that the fee of the attorney of absent heirs is properly chargeable to the share of the estate coming to him. The opposition, as to that item, was therefore correctly sustained.

The charge for erecting tombs over the graves of the deceased and his wife, was rejected. This would be undoubtedly correct, if the curator had expended the means of the estate for that purpose without the consent, either express or implied of the heir. The cost of such a work forms no part of the funeral expenses, according to the definition of the Code, art. 3159. The charges incurred for the interment of the deceased, whether with or without a tomb, precede the appointment of the curator. But it is shown in evidence that Lemel said before his death, that he intended to do some work on the tomb of his wife, but if he never recovered he wished Martin, to do it, and Martin spoke to the plaintiff about building the tombs, and plaintiff said nothing on the subject, but afterwards complained of the high charge for them. Although no effect could be given to the verbal request of the deceased alone, yet when communicated to the heir, together with notice of an intention on the part of Martin, to comply with it and to erect tombs both over Lemel and his wife, and no objection was made by the opponent, but he stood by and saw the work done without opposition; his silence must be regarded as evidence of assent. "Assent is implied," says the Code, "when it is manifested by actions, even by silence or by inaction in cases in which they can from circumstances be supposed to mean or

The fee of the attorney of absent heirs is properly chargeable to the share of the estate coming to them.

The cost of erecting tombs over the grave of the deceased, forms no part of the funeral expenses, and the curator has no authority to expend the means of the estate for this purpose without the consent of the heir.

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HISEM
vs.
LEMEL'S
CURATOR.

Where the
curator, in
compliance
with a verbal
request of the
deceased in his
last sickness,
and with the
implied assent
of the heir,
erects tombs
over the de-
ceased and his
wife, he will be
allowed the
sum expended,
in his account
against the
estate.

by legal presumption are directed to be considered as evidence of an assent," art. 1806. When the father of a deceased daughter is informed, by a person having charge of a fund destined to be paid over to him as heir, that he is about to expend a part of it in erecting a tomb over her remains, and those of her husband, in compliance with his dying request, and he makes no objection, it is so natural to suppose that he would himself desire it, that we can only interpret his silence as evidence of an acquiescence, and if he is not restrained by a sense of propriety, he is by law, from afterwards objecting to an expense thus tacitly authorized by himself. The court therefore, in our opinion, erred in rejecting the credit claimed by the curator on that account, one-half of which, to wit: \$75, is a proper charge against the opponent.

The price of boarding the plaintiff, was correctly reduced to \$25 per month. The forty-six dollars for furniture was improperly charged to the plaintiff, as it appears that the furniture belonged to his daughter, before her marriage.

The result is a balance in favor of the appellee of \$285 50.

The judgment of the Court of Probates is therefore reversed; and proceeding to render such judgment as ought, in our opinion, to have been rendered below, it is further adjudged and decreed that Valentine Hiseem recover of the defendant, Jehn Martin, the balance in his hands belonging to the succession of Lemel, to wit: the sum of two hundred and eighty-five dollars and fifty-nine cents, with interest at five per cent. from the date of the first judgment, with costs in the court below, the cost of the appeal to be paid by the appellee.

CHEEVERS vs. BURKE'S ADMINISTRATRIX.

WESTERN DIS.
September, 1841.

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF ST. MARTIN.

CHEEVERS

vs.

BURKE'S ADMIN-
ISTRATRIX.

191 429
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After a judgment by default, and answer to the merits, an exception denying the defendant's capacity to be sued as administratrix, is not admissible.

Where a case comes up on a judgment of non-suit in which there was no trial on the merits, or bill of exception taken, this court cannot go into the merits.

This is an action on an account against the administratrix of Wm. Burke, deceased, for lumber and materials furnished for repairs and improvements of the dwelling house and kitchen of the deceased, amounting to \$377 78, according to a detailed account annexed to the petition.

The defendant pleaded the general issue; and also averred that certain admissions of the correctness of said account, made by her in writing at the foot of it, were made in error and are not binding on the estate, the claim being unliquidated. She puts the plaintiff on strict proof, and prays that the demand be rejected. She then filed an exception for the dismissal of the suit, on the ground, that she was the widow of the deceased, and natural tutrix of the children, but had never been appointed administratrix.

There was judgment of non-suit, and the plaintiff appealed.

Magill & Morse, for the plaintiff.

Voorhies, contra.

Garland, J. delivered the opinion of the court.

Petitioner alleges that the estate of William Burke, deceased, is indebted to him the sum of \$377 78, for lumber furnished the said William Burke, from the 15th of June, 1839, up to December the 18th, of the same year, to be used in the "repairs and improvement of a two story house and kitchen of said Burke, together with lumber for the house in which his widow Eleanor Lee now resides." He alleges he has a privilege on the said buildings as having furnished materials for their repair and improvement. He alleges "Eleanor Lee

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ISTRATRIX,

has been legally appointed administratrix of the succession," and refuses to pay the aforesaid sum. He therefore prays that *Eleanor Lee* be cited, and he have judgment against the succession for the amount of his claim and costs. With his petition the plaintiff files a detailed account against the estate of William Burke, at the foot of which, "*Eleanor Lee, widow and administratrix of the late William Burke,*" admits in writing, that the lumber was furnished and employed for the purpose alleged, and that the sum claimed is due. On the 11th of August, 1840, a judgment by default was taken, and on the 22d of February, 1841, the defendant filed an answer to the merits. On the same day, "the defendant amending her original answer," says, she is the widow and surviving partner of William Burke, deceased, and natural tutrix of her minor children issue of said marriage, but she has never been legally appointed administratrix of Burke's succession, that she has applied for said appointment, but has never legally qualified as such, she therefore asks this suit to be dismissed. Whereupon the judge says, "the plaintiff cannot maintain this action in law," and enters a judgment of non-suit.

After a judgment by default, and answer to the merits, an exception denying the defendant's capacity to be sued as administratrix, is not admissible.

In this judgment the judge erred. The defendant, after a judgment by default, and an answer to the merits, had no right to file any such exception. The 23d section of the act to amend the Code of Practice, approved March 20, 1839, says, "hereafter no dilatory exceptions shall be allowed in any case, after a judgment by default has been taken, and in every case must be pleaded in *limine litis*; nor shall such exceptions hereafter be admitted in an answer in any cause."

The defendant does not except to the jurisdiction of the court, but merely wishes the plaintiff to prove her representative capacity. This she cannot do, as by her answer to the merits she has admitted the capacity in which she was charged, and the law absolutely forbids the filing of any such exception after a default or plea to the merits.

Where a case comes up on a judgment of non-suit, in which there was no trial on the merits, or bill of exception taken, this court cannot go into the merits.

In the points filed, the parties seem to wish us to go into the merits of the case, they do not appear to have been examined

in the court below; there is therefore nothing for us to review, WESTERN DIS.
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no evidence having come up with the record.

The judgment of the Probate Court is therefore annulled, avoided and reversed, and it is further ordered that this cause be remanded to the Probate Court of the parish of St. Martin, to be proceeded in according to law, the defendant and appellee paying the costs of this appeal.

BROWNSON
vs.
FENWICK.

BROWNSON vs. FENWICK.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT FOR THE PARISH OF ST.

MARTIN, THE JUDGE OF THE SEVENTH PRESIDING.

Parol evidence is admissible in contradiction to the written statement of the defendant, intended as a settlement between the parties, and also of title to a slave, under the pleadings alleging fraud.

An agent to purchase slaves, cannot buy from himself, or put one of his own slaves in, so as to charge the principal with his price or value; and where there was deception inducing him to settle with the agent, he will recover back the price, as having been allowed in error.

Legal interest from judicial demand on liquidated claims will be allowed, when the party was then first in delay.

When a demand is afterwards set up for services growing out of a transaction already settled between the parties, for which no charge was made, and it is not shown the settlement was erroneous, it will be presumed the services were gratuitous.

This is an action to recover \$575, the amount of a promissory note signed by the defendant, with 10 per cent. interest; and also \$829 95, advanced to the defendant with other funds, to purchase slaves.

The plaintiff alleges, that on defendant's return from Maryland, he informed petitioner, that he had purchased a slave

WESTERN Dns. named Dennis, from the estate of Leo Fenwick, for \$800, who
September, 1841, had made his escape and run away, on coming to Louisiana,

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vs.
FENWICK.

and that petitioner was induced from his representations, to settle for the price and expenses of said slave, and allow the sum of \$829 95 therefor. That he has since been informed, the defendant did not purchase said slave, but he belonged to the estate of Alexander Leo Fenwick, deceased, of whom defendant was administrator; and inventoried at \$750. That said defendant, in consequence of being put in possession of said property, was bound to keep it for the benefit of the legatees, &c. That he brought the slaves of said estate to Louisiana, and placed them on his plantation, not as his own, but for the benefit of the persons interested in the estate of Alexander Leo Fenwick, under his will, and it was never intended by him, before the slave Dennis made his escape, that he was to be placed to the account of this petitioner, &c. He further alleges, that the defendant has been guilty of gross fraud and deception; and by his falsely representing the purchase and escape of the slave Dennis, he was induced to allow and pay the defendant the said sum of \$829 95. He prays judgment for the said sums of \$575, with 10 per cent. interest, and \$829 95, also with interest from the time the defendant received said sum, until paid.

The defendant pleaded the general issue; he admitted he received the nett proceeds of plaintiff's draft on Lambeth & Thompson, *to wit*: \$9,798, but has faithfully accounted for the same. He specially denies the fraud and deception alleged, and prays, that the plaintiff's demand be rejected, &c.

On the trial the plaintiff established, that the slave Dennis belonged to the estate of Alexander Leo Fenwick, deceased, of which defendant was administrator and had control; that he took the slave Dennis out, and charged him as one of the gang he purchased for plaintiff at the price of \$800; and that Dennis run away at Cincinnati. There was judgment for the plaintiff for \$1405 95, the entire sum claimed, with ten per cent. on the amount of the note. The defendant appealed.

Voorhies, for the plaintiff.

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Morse & T. H. Lewis, for the defendant, maintained the following points:

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1. The only question is the right of the plaintiff to re-open a settlement regularly made in writing between the parties, in which plaintiff, with a full knowledge of all the facts and his rights in law, passed his receipt in full and without any reservation.

2. Had any question or reservation been left for future decision, as was attempted to be shown by parol testimony, the same should have been inserted in the receipt, and the testimony of Maskell & Baker, (which was objected to below,) should have been rejected, as contradicting the writing passed between the parties.

3. If the parties are allowed to go behind the receipt and settlement, then the charge made by defendant for his services and trouble in bringing the negroes to Attakapas, should have been allowed, as it was clearly proven.

4. Any admissions, that defendant may have made, that he would not charge any thing for his services, were made in consideration of the loss of the negro Dennis, borne by plaintiff. But if he is to be held responsible, then the same was made in error of law and fact.

5. It is admitted, that all the negroes were purchased in defendant's name, and in no event should he be liable for more than his proportion, say as 14 to 11, which plaintiff offered before the institution of the suit.

6. The court erred in not sustaining the exception to parol testimony.

Bullard, J. delivered the opinion of the court.

The plaintiff sues to recover the amount of a promissory note, which is not contested, and the further sum of \$829 96, upon the following allegations. That in 1835 he employed the defendant as his agent, to purchase for him in Maryland a

WESTERN DIST.
September, 1841.

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vs.
FENWICK.

Certain number of slaves, and furnished him funds for that purpose. That the defendant purchased several slaves for him, and paid for them with his funds, and on his return to Louisiana delivered them to him, informing him in the meantime, that a certain negro man, named *Dennis*, whom he said he had purchased for the plaintiff of the estate of Leo Fenwick, had made his escape on his way from Maryland to Louisiana, and that he had cost \$800, of all which the defendant gave a written certificate; by which he also declared, that he had settled with the plaintiff for the price and expenses amounting to \$829 95. He further alleges, that he has ascertained, that the defendant never made any such purchase as was represented by him, that *Dennis* never was sold to him or to any other person by the estate of Leo Fenwick, but still belongs to that estate. That the defendant, while in Maryland, was appointed executor or administrator to the estate. An inventory was duly made of the property belonging to the estate, which includes the negro man *Dennis*, estimated at \$750. That the defendant was put in possession of the property, and was bound to keep the same for the legatees. That being thus in possession, he proceeded to bring them to this State, not as his own, but for the benefit of the legatees, and that before the escape of *Dennis*, it never was the intention of the defendant, that he should be the property of the plaintiff. He alleges, that the defendant had thus violated his confidence, and was guilty towards him of gross fraud and deception, and he asks judgment for the amount thus retained, together with interest due in consequence of his infidelity as agent.

The defendant, in his answer, denies all the facts and allegations in the petition contained, and avers, that he has faithfully accounted for the nett proceeds of a draft on Lambeth & Thompson, and he specially denies all the frauds charged against him.

There was judgment for the plaintiff and the defendant appealed.

The first question, which has been presented for our com-

consideration, is, whether parol evidence was admissible to contradict the written statement of the defendant, which was intended to serve as evidence of a settlement between the parties, and of title to the negro Dennis. We are of opinion, that the evidence was properly admitted for that purpose under the pleadings. The plaintiff alleges, that the certificate is false, and that the defendant had deceived and defrauded him. In support of those allegations parol evidence was clearly admissible.

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BROWNSON
vs.
FENWICK.

Parol evidence is admissible in contradiction to the written statement of the defendant, intended as a settlement between the parties, and also of title to a slave, under the pleadings alleging fraud.

It is contended on the part of the defendant, that by the laws of Maryland he had a right, as administrator, with the will annexed, to take the personal property, including slaves, on his own account, at the price of estimation, and that having by an account rendered and approved by the orphans' court, charged himself with the slaves inventoried as the property of his brother's estate, they became his, and he had a right to dispose of them. Admit this to be true, the difficulty still remains, by what means did the slave Dennis become the property of Brownson, so as to make him accountable for the loss? It is certain, that the certificate of the defendant does not even purport to convey a new title to the plaintiff. The consent of Brownson personally is nowhere shown to become the owner. Upon the supposition, the most favorable to the defendant, that having employed the funds of the plaintiff in payment of the debts due by his brother's estate, his intention was to convey the slave Dennis to the plaintiff; yet no such agreement is shown before the loss of the slave. As agent of Brownson, to purchase slaves, he could not purchase one from himself, either in his personal capacity, or as administrator of the estate of Leo Fenwick. In the case of *Beal vs. McKernian*, 6 La. Reports, 407, we held, that Beal, the agent to purchase cotton, could not take cotton which he held for sale himself as a commission merchant, to fill the order. No agreement or contract can be made without the concurrence of two minds, and it is a legal absurdity to say, that Fenwick could purchase as agent for Brownson, from himself. As mandatory it was his duty to purchase on the best terms for his employer; as owner he

An agent to purchase slaves, cannot buy from himself, or put one of his own slaves in, so as to charge the principal with his price or value. And where there was deception inducing him to settle with the agent, he will recover back the price as having been allowed in error.

WHITMAN DIST. would naturally endeavor to get the highest price—the two are utterly incompatible. We therefore conclude, that Dennis

BROWNSON

vs.

KENNICK.

never was the property of Brownson, and the price retained for him by the defendant ought to be refunded as having been allowed in error.

Legal interest from judicial demand on liquidated claims, will be allowed, when the party was then first in delay.

The appellee prays for an amendment of the judgment in his favor, by an allowance of interest on the sum of \$829 95, according to article 2084 of the Louisiana Code. We think he is entitled to interest at five per cent. from judicial demand only, the sum being liquidated, and he was then first in delay.

When a demand is afterwards set up for services growing out of a transaction, already settled between the parties, for which no charge was made, and it is not shown the settlement was erroneous, it will be presumed the services were gratuitous.

The defendant, by an amended answer, sets up a claim for \$1000 in compensation, of which \$750 was stated to be for services rendered as agent in purchasing slaves in Maryland, and bringing them to Attakapas, and two hundred and fifty dollars for negotiating drafts. This account relates to the same transactions, and at the time of the settlement no such charge was made by the defendant. It is not shown, that the settlement was erroneous in that respect, and we are to presume, that the services were gratuitous. No agreement is shown to pay commissions.

It is therefore adjudged and decreed that the judgment of the District Court be affirmed with costs, together with five per cent. interest per annum on the sum of \$829 95 from judicial demand.

**HUTCHINGS' WIDOW AND HEIRS vs. JOHNSON'S
HEIRS.**

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**HUTCHINGS'
WIDOW
AND HEIRS
vs.
JOHNSON'S
HEIRS.**

APPEAL FROM THE COURT OF THE FIFTH DISTRICT FOR THE PARISH OF ST.
MARY, THE JUDGE OF THE SEVENTH PRESIDING.

The value of the hire and use of slaves, mortgaged and put in possession of the mortgagee, to indemnify him against an endorsement, will be allowed in compensation of the amount actually paid by him as endorser.

This is an action to recover the value of the services of five slaves, alleged to have been in the possession of the defendants under mortgage for the space of seven years. Their services are alleged to be worth fifteen dollars per month each, independent of their clothing and other expenses. He prays judgment for the amount of said hire; or if the defendants succeed in establishing their demand, that the amount of the hire of these slaves go in compensation thereof.

The defendants, heirs of the late J. L. Johnson, pleaded the general issue; they further set up by way of compensation of the plaintiffs' demand, the amount of an endorsement which their ancestor had paid in bank for Hutchings, and to secure which the slaves in question were mortgaged and placed in their possession.

The amount paid by Johnson to the bank in 1837, as endorser of Hutchings, was established at \$3720. The value of the hire and use of the slaves was the subject of controversy, and the testimony a little discordant in regard to the true amount.

The district judge, after hearing all the evidence decided there was a balance due to the defendants of \$765, with nine per cent interest; for which judgment was rendered: and they being dissatisfied with the amount took this appeal.

Voorhies, for the plaintiffs.

Splane, for the defendants.

Bullard, J. delivered the opinion of the court.

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WIDOW
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HEIRS.

The history of this case may be seen by reference to the cases of *Hutchings vs. Field et al.*, and *Hutchings vs. J. L. Johnson*, 10 La. Rep., 245, 257. This court having decided in the case first mentioned, that a certain contract between Johnson and others and Hutchings was not one of sale of the slaves in controversy, but rather of mortgage or antichresis, he recovered them and the latter case between him and Johnson was remanded for a new trial in consequence of that change in the condition of the parties. The pleadings were amended; the defendants claiming in an amended answer the amount paid by their ancestor in bank, as one of the endorsers of Hutchings, as an offset to the value of the services of the slaves during a period of more than seven years that they were in possession of Johnson under the contract. The result of the last trial was a judgment against Hutchings in favor of the heirs of Johnson for a balance of about seven hundred dollars, with interest at nine per cent. from 1837. The heirs of Johnson appealed.

It appears that the amount of the different notes of which Johnson was endorser, and which he finally took up in the Bank of Louisiana at Opelousas, was three thousand seven hundred and twenty dollars. That amount is alleged by Johnson's heirs to be the total sum paid for Hutchings, in a petition for a provisional seizure of the slaves in 1837, which was afterwards discontinued. The evidence as to the value of the services of the slaves is variant though not absolutely discordant, and one of the witnesses who had hired them for one year for \$175 free of all charges, states that including the year 1838 up to April, 1839, they were worth five hundred dollars per annum, clear of all expenses, including the whole of the negroes. Assuming that to be a just appraisement, and we see nothing in the record to contradict it, the judgment pronounced by the court below is not so clearly erroneous as to require our interference.

It is therefore adjudged and decreed, that the judgment of the District Court be affirmed with costs.

THIBODEAUX vs. THIBODEAUX.

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APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF LAFAYETTE.

THIBODEAUX
vs.
THIBODEAUX.

A married woman may sue her tutor, in the Court of Probates, for the balance due her; and maintain the action with the assistance of her husband, on a note given in his name, as her agent, for a part of the sum coming to her.

This is an action by the plaintiff against her late tutor, claiming the sum of \$929, balance due on account of the tutorship, part of which is evidenced by a note of \$562, bearing ten per cent interest, executed by the defendant the 31st July, 1834, payable twelve months after date to her husband, Elize Messonier. She prays judgment for the said sum of \$929.

The defendant excepted to the jurisdiction of the Probate Court and averred that the District Court alone had jurisdiction of the matters set up in this suit.

On the merits the general issue was pleaded. The defendant also avers that he has long since accounted for and paid to the defendant the amount coming to her from the estate of her father, or from any other source. That on the 28th August, 1825, the plaintiff executed a receipt on a full settlement, whereby she acknowledged to have received from him as her tutor the full amount due to her from her father's estate; that nothing from the mother's estate ever came into his hands. That she purchased a slave woman named Hyacinthe for upwards of \$900 of her mother's estate, on account of her hereditary portion in said estate. He further pleads the prescription of four and ten years against plaintiff's demand. In an amended answer he avers he gave a negro woman named Carmelite for \$880, in payment of her claims on him by a verbal sale, and propounds interrogatories.

On these pleadings and issues the parties went to trial.

This suit was first instituted in the District Court but dismissed on a plea to the jurisdiction.

On the evidence adduced, there was judgment for \$573 00, with legal interest and costs.

The defendant appealed.

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September, 1841.

TRIBODÉAUX
vs.
TRIBODÉAUX.

Crow, for the plaintiff.

Voorhies, for defendant and appellant.

Martin, J. delivered the opinion of the court.

The plaintiff claims from the defendant, who was her tutor, the sum of \$929, as the balance due her in that capacity.

She had a judgment for the sum of \$573 69, the amount of a note given by the defendant to her husband for the balance due to her. With the assistance of her husband she instituted a suit in the District Court on this note, in which she failed, that court being of opinion that her remedy was in the Court of Probates. With the same assistance she has brought the present suit in the Court of Probates; the payee of the note being her husband, and the suit not being instituted by him, but by his wife with his assistance.

It does not appear to us that the court erred. The note was given to the husband as the agent of the wife. This is expressly stated in the petition; and the assistance of the husband, enabling her to sue, presupposes his knowledge of the nature of her claim, and his consent to its being enforced; for he is the judge of the propriety of the suit, and it cannot be supposed that he assisted her in an improper one; much less one that is detrimental to his own rights.

The husband might indeed have considered the note as his own property; transferred it or instituted suit on it in his own name. This he has not chosen to do; but on the contrary, has consented to assist his wife in two suits in her own name brought on this same note as owner of it. His recognition of the right of his wife would certainly repel him, if he were now seeking to treat the note as his own property.

We have not considered the other part of the plaintiff's demand, as she has not appealed.

The judgment of the Court of Probates is therefore affirmed with costs.

ANDERSON'S ADMINISTRATOR vs. BIRDSALL'S
ADMINISTRATRIX.

WRITERS Dig.
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ANDERSON'S
ADMINISTRATOR
vs.
BIRDSALL'S AD-
MINISTRATRIX.

19	441
125	11

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF ST. MARY.

An appeal will not be dismissed, for want of citation of appeal, when it was caused by the fault of the appellee.

It is no ground for a continuance that a witness is insane, and time is asked, that he may recover, and his deposition be taken; especially when it is not shown he would be able to testify in a reasonable time.

When the answer sets up no special contract, a continuance need not be allowed for the party to procure the testimony of a witness, as it is unimportant to the defence to prove one.

Where a person has treated with a minor, he cannot plead the nullity of the agreement, when sought to be enforced after the disability has ceased.

Where a claim against an estate is unliquidated, or the curator objects and refuses to approve it, the party may sue on it in the Court of Probates; but he cannot have execution immediately, as it must be paid concurrently with other creditors.

Claims against estates in the course of administration, bear *legal* interest from the time they are due and payable, although unliquidated.

The administrator of W. F. Anderson, deceased, claims the sum of \$3000, from the defendant, Emily A. Birdsall, as administratrix of the estate of her deceased husband, F. G. Birdsall; being for the wages of W. F. Anderson, as a clerk in the store of F. G. & J. B. Birdsall, for three years, and up to the time of his death, in September, 1839. He prays judgment against the estate administered by the defendant, and also against J. B. Birdsall the surviving partner.

The defendants excepted to the action, as against the succession of a deceased partner, and the survivor in the Probate Court; especially as the demand was against a mercantile firm. It was dismissed as to J. B. Birdsall.

The administratrix pleaded the general issue: and averred that no recovery could be had, as the deceased, W. F. Anderson, was a minor when he engaged himself as a clerk, and when the services were rendered, and that his parents alone could legally claim them; and finally, that the services were not worth what was claimed, &c.

Upon these pleadings and issues the cause was tried. The

WESTERN DIS. questions of law raised in the course of the trial are fully stated
September, 1841. in the opinion of this court.

ANDERSON'S
 ADMINISTRATOR
 vs.
 BIRDSALL'S AD-
 MINISTRATRIX.

From the testimony adduced, the Judge of Probates was of opinion the plaintiff's demand was shown to be worth in the aggregate \$1260, from which a credit of \$674 76 was to be deducted, leaving a balance of \$585 25, for which judgment was rendered. The defendant appealed.

Splane, for the plaintiff.

Dwight & Gibbons, for the defendant.

Bullard, J. delivered the opinion of the court.

The administrator of the estate of W. F. Anderson instituted the present suit against the administratrix of the estate of F. G. Birdsall, deceased, and against James B. Birdsall, surviving partner, to recover the value of his intestate's services as clerk of the firm for three years previous to his death, which he fixes at three thousand dollars.

James B. Birdsall excepted to the jurisdiction of the Court of Probates; his plea was properly sustained, and the suit dismissed as to him.

The other defendant, after setting up some exceptions as to the propriety of the plaintiff's appointment to administer on the estate of Anderson, which seems to have been disregarded by the court, finally answered by denying the allegations in the plaintiff's petition. She further denies the right of the administrator, to recover the wages of the deceased, most of which were earned while he was a minor, he having died at the age of twenty-two years. She further denies, that his services were worth the amount claimed, and avers that he received in his lifetime the full amount due him. She further excepts, that the claim never was presented to her before bringing suit, as the law requires.

After the suit had been discontinued as to the surviving partner, Henry C. Dwight, who, it appears, had purchased his in-

terest in the concern, and became liable for his share of the debts, came forward with a petition of intervention, setting forth these facts, and offers to sustain the defendant in her defence. As he asks no judgment in his own favor, and no judgment was pronounced as to him, and he is not a party to this appeal, no further notice of his intervention is required.

The court having pronounced a judgment against the administratrix for a balance due to the deceased, she appealed. The judgment was rendered on the 17th of August, 1840, too late to prosecute an appeal to the August term of this court for that year, and the appeal was made returnable at the present term. The appellee however brought up the transcript last year together with the petition of appeal and the bond, having waived all formalities; but the court refused to try it before the proper return day. The appellee now moves to dismiss the appeal on the ground, first, that it was not made returnable to the proper time; and secondly, that no citation has been served. We cannot grant his motion. We have already expressed our opinion, that the appeal was properly made returnable at the present term, and it is manifestly the fault of the appellee, that no citation issued, as he had taken the transcript out of the office, and waived citation.

WESTERN DIS.
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ANDERSON'S
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An appeal will not be dismissed, for want of citation of appeal, when it was caused by the fault of the appellee.

The appellant calls our attention to a bill of exceptions, upon which he relies to show, that a postponement of the trial was improperly refused. The ground for the continuance was, that a commission, issued to take the deposition of J. B. Birdsall, could not be executed, because he was insane, but was expected to recover shortly, and the postponement was asked for a period not exceeding one year. The affidavit sets forth, that the defendant expects to prove by the absent witness a special contract for wages at the rate of \$12½ per month for the first year, and \$20 for the second and third, with board, washing and lodging; and that he had been fully paid. The court overruled the motion on the ground, that the witness was interested, being a former partner; and originally a party to this suit. The court, in our opinion, did not err in refusing the continu-

It is no ground for a continuance that a witness is insane, and time is asked, that he may recover, and his deposition be taken; especially when it is not shown he would be able to testify in a reasonable time.

WHEATON DR.
 September, 1841.

ANDERSON'S
 ADMINISTRATOR
 vs.
 BIRDSALL'S AD-
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Where the answer sets up no special contract, a continuance need not be allowed for the party to procure the testimony of a witness, as it is unimportant to the defence to prove one.

Where a person has treated with a minor, he cannot plead the nullity of the agreement, when sought to be enforced after the disability has ceased.

Where a claim against an estate is unliquidated, or the curator objects and refuses to approve it, the party may sue on it in the court of probates; but he cannot have execution immediately, as it must be paid concurrently with other creditors.

Claims against estates in the course of administration, bear legal interest from the time they are due and payable, altho' unliquidated.

ance, although he may not have given the best reason for it. The answer does not set up a special contract with young Anderson, and consequently it was not important to the defence to prove one. The affidavit does not show a probability, that Birdsall, the absent witness, would be in a situation to testify within a reasonable time.

That part of the defence, which sets up the minority of young Anderson as a ground for not paying him or his administrator, cannot avail the defendant. Having treated with the minor himself, she cannot plead the nullity of the agreement, when sought to be enforced, after the disability has ceased; La. Code, 1785. It does not appear, that the father or any other person standing *in loco parentis*, intervened in the contract, much less has set up any claim to the wages due to the deceased.

Another exception remains to be disposed of, to wit: that this claim was not first presented to the administrator for his admission. Article 984 of the Code of Practice, it is true, provides, that no bearer of a claim for money against a succession administered by a curator, executor or administrator, shall commence an action against such succession, before presenting his claim to the curator. But we understand this provision to apply to liquidated claims only; for a subsequent article declares, that if the claim "be not liquidated, or if the curator, &c., have any objection to it, and subsequently refuse to approve it, the bearer of the evidence of such claim may bring suit in the ordinary manner before the Court of Probates," &c. Art. 986. In the present case the claim is unliquidated, and consequently the exception cannot avail the defendant. But it does not follow that the plaintiff will be entitled to an execution at once; for the claim can only be paid in concurrence with the other creditors. Arts. 967, 1068 et seq.

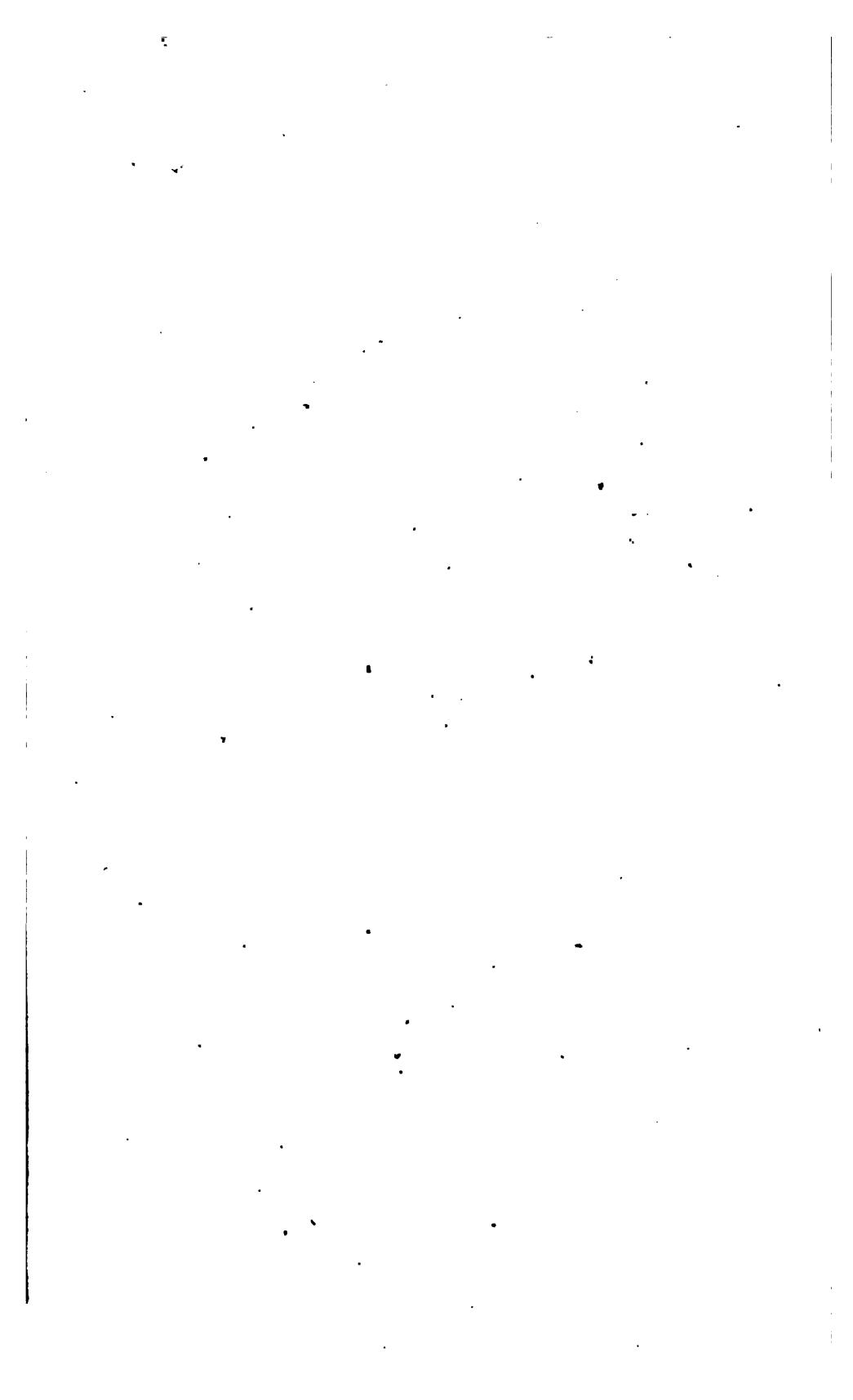
Upon the merits, the judgment does not appear to us so unsupported by evidence as to justify our interference. We are not satisfied, that injustice has been done the defendant.

Interest was properly allowed at five per cent. from the

death of the defendant's intestate; it not being shown, that the estate was insufficient, and we are to presume it solvent. Code of Practice, 989. WESTERN DIG.
September, 1841.

It is therefore ordered and decreed, that the judgment of the Court of Probates be affirmed with costs.

ANDERSON'S
ADMINISTRATOR
vs.
BIRDSEALL'S AD-
MINISTRATRIX.



REPORTS
OF
CASES ARGUED AND DETERMINED
IN
THE SUPREME COURT
OF
THE STATE OF LOUISIANA.

WESTERN DISTRICT.
ALEXANDRIA, OCTOBER TERM, 1841.

GAS LIGHT & BANKING CO., vs. NUTTALL.

APPEAL FROM THE COURT OF THE SEVENTH DISTRICT, FOR THE PARISH OF
CATHOULA, THE JUDGE OF THE SIXTH PRESIDING.

Two witnesses are required, not only to the protest, but to the record of the certificate of the notary, under the act of 1821; and this act is not superseded by that of 1827; both of which require the *certificate* of protest to be attested by two witnesses, to be *evidence* of notice.

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October, 1841.

GAS LIGHT AND
BANKING CO.,
vs.
NUTTALL.

This is an action against the endorser of two promissory notes, amounting to \$2,325, discounted in Bank. The defendant pleaded a general denial. There was judgment for the plaintiffs, and the defendant appealed.

On the trial, the plaintiff offered in evidence the protests of the notes sued on to prove demand, to the introduction of which, defendant's counsel objected, on the ground that the two subscribing witnesses in whose presence the protests have been made, did not sign the protests, and that these acts are

WESTERN DIS.
October, 1841.

GAS LIGHT AND
BANKING CO.,
vs.
NUTTALL.

not such as are required by law to make proof of themselves, of the facts contained in them. The objection was overruled and the defendant's counsel excepted.

The plaintiffs then offered the testimony of witnesses to prove the death, acts as notary and other conduct of the notary who made the protest; which was objected to on the grounds that it was not authorized by the allegations in the petition: Also, the plaintiffs offered in evidence the certificates appended to the protests, signed by the notary, to prove notice to the endorsers; to the introduction of which, defendant objected, on the grounds, that they were not in accordance with the statute: that it did not appear the notary kept any book in which these entries were made; that they are not signed by two witnesses, and do not appear to be in the hand-writing of the notary or signed by him: but the court overruled the objections and received the certificates.

The defendant took his bill of exceptions.

The protest was signed in the presence of two witnesses, but the certificate of the notice to the endorser was signed by the notary alone.

Mayo & Purvis, for the plaintiffs and appellees, urged the affirmance of the judgment.

Garrett, for the defendant, insisted that the certificate of the notary was wholly insufficient as evidence of notice to the endorser. The act of 1821 is express that the certificate must be recorded and attested by two witnesses.

Bullard, J. delivered the opinion of the court.

This is an action against the endorser of two promissory notes. The only question which the case presents, relates to the sufficiency of the evidence of notice of protest.

The plaintiffs gave in evidence a protest made by a notary public which appears to be regular; it is attested by two witnesses, and bears the notary's seal. On the same sheet is a certificate of the notary under his seal, bearing the same date

with the protest, but not attested by any witness, and not pur-
 porting ever to have been recorded, in which the notary states
 the manner in which the endorsers were notified of the de-
 mand made upon the drawer and his failure to pay. The
 written notice which he certifies was forwarded by the first
 mail, addressed to the defendant at his domicile in Sicily Island,
 was sufficient if the certificate of the notary without witnesses
 furnish sufficient legal proof of the fact.

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 October, 1841.

CAS LIGHT AND
 BANKING CO.,

VS.
 NUTTALL.

Under the act of 1821, concerning protest of Bills of Ex-
 change and Promissory Notes, and notices, &c., such certifi-
 cate would be clearly insufficient. That act required the
 notaries to keep a separate book in which they shall transcribe
 and record by order of dates, all the protests made by them,
with mention of the notices which they have given of the same
 to the drawers or endorsers, together *with the names* of the
 said drawers and endorsers, the date of said notices, and the
 manner in which they were served or forwarded to the said
 drawers or endorsers, which declaration duly recorded under
 the signature of the said notary public or parish judge, and
 two witnesses, shall be considered and received as legal proof
 of said notices.

Under this statute it was held at an early period, that not
 only two witnesses were required to the protest itself, but to
 the record of the certificate.—5 Martin N. S. 511.

Two wit-
 nesses are re-
 quired, not
 only to the pro-
 test, but to the
 record of the
 certificate of
 the notary, un-
 der the act of
 1821; and this
 act is not su-
 perceded by
 that of 1827;
 both of which
 require the cer-
 tificate of pro-
 test to be at-
 tested by two
 witnesses, to be
 evidence of
 notice.

The act of 1827, amendatory of the one above mentioned,
 under which it is contended this certificate is valid and suffi-
 cient, enacts that notaries are authorized in their protests to
 make mention of the demand made upon the drawers, accep-
 tor, or person on whom such order or bill of exchange is drawn
 or given, and of the manner and circumstances of such de-
 mand, "and by certificate *added to such protest* to state the
 manner in which any notices of protest to drawers and en-
 dorsers, &c., were served or forwarded; and whenever they
 shall have so done, *a certified copy of such protest and cer-
 tificate shall be evidence of all the matters therein stated.*"
 Acts of 1827, page 76.

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October, 1841.

GAS LIGHT AND
BANKING CO.,
vs.
BUTTALL.

This is the first occasion within our knowledge upon which a simple certificate of the notary without the attestation of witnesses and never recorded, has been presented as evidence of notice to endorsers under the statute. Its sufficiency depends upon the question, whether the act of 1827 repeals that of 1821, in this respect. In the case of *Whittemore vs. Leak and Howell*; 14 La. Rep. 394; the question was raised by the counsel, but we held that in as much as the copy of the certificate of notice in that case exhibited the names of two attesting witnesses, we would presume they had signed the original, and that consequently it was not necessary to decide how far the statute of 1821 had been repealed or modified by that of 1827.

There is clearly no express repeal. The 4th section declares that all acts and parts of acts *contrary to the* purport of this act be, and the same are hereby repealed. This repealing clause does no more than announce the well known principle of law, that when the provisions of two statutes are contrary to, or irreconcilable with each other, the prior is abrogated by the posterior one. May not these two statutes well stand together? and are we not bound to regard the provisions of the latter as cumulative? If we were to say that the attestation of two witnesses may be dispensed with as to the certificate of notices, the same reason applies to dispense with them in the body of the protest as to demand of the acceptor or maker. The act of 1827 makes no mention of witnesses in either case. But it speaks of a protest, and a protest according to the existing law necessarily applies the presence of witnesses as indispensable. A certificate *added to a protest* is not necessarily a separate act, it may be and by the practice of some notaries, frequently is a continuation of the same act of protest so that the same witnesses may attest both. It is true that no law requires the notices to be given simultaneously with the protest, and the certificate of notices is necessarily subsequent in point of time, but there are obvious reasons for requiring the attestation of witnesses to the certificate, even if the re-

ording be dispensed with, as a check upon the notary and to prevent him from adding a certificate afterwards and antedating it. It appears to us that the two statutes must be taken and construed as laws in *pari materia*; and we cannot suppose that the legislature intended to give to the simple naked certificate of a notary the effect of full proof, and to dispense not only with the recording by order of dates of the protests of notaries, but at the same time with the attestation of witnesses to the certificate. Such a practice would leave parties at the mercy of a notary, who cannot be permitted as a witness to contradict his own act. We are confirmed in this view of the case, by what we believe to be the general practice under that statute since its enactment, and in matters of commercial usage; it is dangerous to innovate too lightly until the legislature shall declare that such certificates *shall suffice*, we cannot sanction a deviation from what we consider a legal form.

The original protest and certificate were given in evidence and accompany the transcript. It is shown, that the certificate is not in the handwriting of the notary, though signed by him; and that after his death, the parish judge, in making an inventory of his estate, found no book of record of protests or certificates of notices; and that he was careless in his mode of doing business as a notary. It appears, that he kept no memorandum of such transactions, except very short and vague ones, for the purpose of getting paid for his protests. None of the cases cited by the counsel for the appellee, appear to us to sustain him. In the case of Bullard vs. Wilson, 5 Martin, N. S., 196, the notary was sworn as a witness. The memorandum made by him was *per se* a mere nullity, and was used only to refresh the memory of the witnesses. Notice must be shown either by testimony under oath, or by an official certificate in strict compliance with legal forms.

It is therefore adjudged and decreed, that the judgment of the District Court be avoided and reversed, and that ours be for the defendant as in the case of a non-suit, with costs in both courts.

WESTERN DIS.
October, 1841.

GAS LIGHT AND
BANKING CO.,
VS.
NUTTALL.

CASES IN THE SUPREME COURT

WESTERN DIS.
October, 1841.

GAS BANK vs. PHELPS.

GAS BANK
vs.
PHELPS.

APPEAL FROM THE COURT OF THE SEVENTH DISTRICT FOR THE PARISH OF
CATAROLA, THE JUDGE OF THE SEVENTH PRESIDING.

The certificate of the notary must be recorded and attested by two witnesses, to be admissible as evidence of notice.

This is an action against the maker and endorser of a promissory note.

The maker made no defence. The defendant, Phelps, pleaded the want of legal notice as endorser, &c. The notary's certificate was not recorded and not attested by two witnesses. The notary being dead, the certificate was the only evidence of notice. It was objected to as insufficient, but admitted, and the defendant excepted.

There was judgment for the plaintiffs, and the endorser alone appealed.

Mayo & Purvis, for the plaintiffs.

Phelps, in propria persona.

Bullard, J. delivered the opinion of the court.

The endorser of a promissory note is appellant from a judgment rendered against him as such. He specially denied notice of a demand of the drawer, and his refusal or neglect to pay. And the only evidence offered by the plaintiffs, to prove such notice was the certificate of a notary public, without witnesses. The case cannot be distinguished from that of the same plaintiffs vs. Nuttall, just decided; *ante* 447.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be avoided and reversed, and that ours be for the defendant as in the case of a non-suit, with costs in both courts.

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ROBERTS & CRAIN vs. JENKINS.

WESTERN DIS.
October, 1841.

APPEAL FROM THE COURT OF THE TENTH DISTRICT, FOR THE PARISH OF

CADDO, JUDGE CAMPBELL PRESIDING.

ROBERTS &
CRAIN
vs.
JENKINS.

In a suit on a *joint note*, where it is shown the defendant signed as surety for the other maker; although the obligation be *joint only in its form*, yet the surety is bound for the whole debt, or is liable *in solido*.

This is an action on the following note against one of the makers only; McLeod, the other, being dead.

"*Shreveport, July 1st, 1839.*"

"\$2,450.—One day after date, *we promise* to pay to the order of James G. Jones, the sum of twenty-four hundred and fifty-nine dollars, for value received."

"J. C. McLEOD."

"W. JENKINS."

The defendant Jenkins alone is sued. The plaintiffs allege, he is surety for McLeod, and consequently bound for the whole debt. They propounded interrogatories touching the suretyship, which were neglected to be answered, and taken for confessed.

The defendant admitted his signature and pleaded the general issue; and denied specially, that the plaintiffs were the proper and legal owners of the note in suit.

The district judge was of opinion, from the tenor of the obligation, that it was *joint only*, and that the defendant was liable for only one half. Judgment was rendered accordingly, and the plaintiffs appealed.

Crain, for the plaintiffs and appellants.

Gilbert, for the defendant.

Martin, J. delivered the opinion of the court.

The plaintiffs are appellants from a judgment, in which they have recovered one half only of the amount of the note, on which the suit is brought. It was signed by another person

WESTERN DIS. and the defendant, and is therefore on its face a joint note, or obligation.
October, 1841.

ROBERTS &
GRAIN
VS.
JENKINS.

The plaintiffs and appellants allege, that the defendant signed the note as surety. To establish this, they propounded an interrogatory, which the defendant failed to answer, and it must therefore be taken *pro confesso*. Although on the face of the note, judgment should have been given for the defendant's *virile* part only, the circumstance of his having entered into a contract of suretyship, entitles the plaintiffs to a judgment against him as a surety, notwithstanding the instrument, which is the evidence of the debt, represents him as a joint debtor, and as such liable for only half of the debt. The defendant, by failing to answer the interrogatories, has admitted that he is a surety. He has not said, that he is surety only for a part; and we must consider him as a surety for the whole.

The District Court, in our opinion, erred in restricting its judgment to one-half of the amount of the note.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed: and proceeding to give such judgment as in our opinion ought to have been rendered in the court below: It is ordered, adjudged and decreed, that the plaintiffs do recover of the defendant two thousand four hundred and fifty-nine dollars, and eleven cents, with interest thereon at the rate of 5 per cent. per annum, from the 30th November, 1840, until paid; and costs in both courts.

BRANDER ET AL. vs. GARRETT ET AL.

WESTERN DIS.
October, 1841.APPEAL FROM THE COURT OF THE SEVENTH DISTRICT, FOR THE PARISH OF
OUACHITA, THE JUDGE OF THE SIXTH PRESIDING.BRANDER ET AL.
vs.
GARRETT ET AL.

In an action on a *joint obligation*, when it is shown, two of the parties signed as sureties of the third, any payments made by the principal debtor, will be imputed and go to the extinguishment of the debt, and judgment given for the balance, against the principal and sureties *in solido*.

This is an action on a promissory note against the makers, who all sign as joint obligors.

The defendants severed in their answers. Garrett admitted the note was given for his debt and sole benefit, and set up a payment of about \$1323 for the price of certain cotton, sent by him to the plaintiffs.

The two other defendants pleaded the general issue, and averred the note and debt were paid and extinguished by the principal debtor and their co-defendant. They aver, they are only sureties of Garrett, and plead the benefit of discussion.

It was fully shown, the two last defendants (Pinnell & Peck) were the sureties of Garrett, and that he had made payments.

The district judge however considered all the parties as joint obligors, and each only bound for his share. That Garrett, the principal debtor, (and who had absconded,) was entitled to the credit of \$1323, which extinguished his share of \$833 33, with a reserve over of \$490. Judgment was given in his favor and against the two sureties each for \$833 33. They alone have appealed.

McGuire, for the plaintiffs.

Copley, Downs & Garrett, contra.

Bullard, J. delivered the opinion of the court.

This is an action against Garrett, Pinnell & Peck upon a promissory note, in the form of a joint obligation, for \$2500. The two latter aver in their answer, that they were in point of

WESTERN DIS. fact sureties to Garrett. But they were condemned as joint
October, 1841. obligors, and they have appealed. Garrett is not a party to
BRANDER ET AL. the appeal; but it becomes necessary to go into his defence,
vs. as it appeared by answers of the plaintiffs to interrogatories,
GARRETT ET AL. that the whole debt was Garrett's, and that the co-obligors were
 his sureties. It follows, that any defence, of which Garrett
 could avail himself, may be used by the sureties.

Garrett answered by averring also, that he was principal debtor, but that he had had subsequently a settlement with the plaintiffs' agent, and made payments, for which credits were not given. From the answers of the plaintiffs to interrogatories and other evidence in the record, it appears to us, the district judge justly concluded, that at the time the note fell due, Garrett was entitled to a credit of \$1323 99 upon the note sued on. But it appears equally clear, that the appellants were sureties for Garrett, and yet each of them is condemned for his third of the note; while the principal debtor has judgment extinguishing his part of the note, to wit: \$833 33, and reserving a balance in his favor for \$490 66, which two sums together amount to the credit of \$1323 99. If the principal was entitled to the credit, so were the sureties, notwithstanding the form of the obligation. The mere form should be disregarded and the rights of the parties adjusted according to its real substance and nature, as we recently held in the case of Crain & Roberts vs. Jenkins, decided at this term; *ante* 453. In this respect, we think, the judge erred, and that the defendants, who have not claimed division, should have been condemned *in solido* to pay the balance due upon the note, \$1176 01.

The judgment of the District Court, so far as it relates to the defendants, James Pinnell and Alexander D. Peck, is therefore avoided and reversed; and proceeding to render such judgment as should in our opinion have been given below: It is further ordered and decreed, that the plaintiffs recover of each of said defendants *in solido*, as sureties of Garrett, the sum of *eleven hundred and seventy-six dollars, and one cent*, with interest at five per cent. from judicial demand, and costs

OF THE STATE OF LOUISIANA.

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as to them in the court below, and that the plaintiffs pay the costs of this appeal.

WATKINS Dis.
October, 1841.

HUIE
vs.
BRAZEALH.

HUIE vs. BRAZEALH.

APPEAL FROM THE COURT OF THE SIXTH DISTRICT FOR THE PARISH OF
NATCHITOCHES, THE JUDGE THEREOF PRESIDING.

Where the last day of grace for the payment of a note or bill is a Sunday or a day of rest, the protest is properly made on the preceding day.

Personal notice of protest may be made on the endorser at any place, however distant from his domicile; and personal notice dispenses with constructive notice, by sending it through the post office.

This is an action against the endorser of a promissory note, dated the 15th February, 1837, payable twelve months after date, to the order of the defendant, and by him and others endorsed. The note was made payable in New Orleans, and became due the 15th and 16th February, 1838; the last day being *Sunday*, it was protested on Saturday, the 17th, and notice of protest served personally on the defendant, in New Orleans, the following Monday. His domicile was in the parish of Natchitoches. The defendant pleaded the general issue; and the want of due and legal notice of protest.

• There was judgment for the balance due on said note against the defendant, and the other parties to it, *in solido*, and he alone appealed.

Curry, for the plaintiff, and on the part of Mr. *Sherburne*, the original counsel, submitted the case on written points.

Roysden, contra.

WILKINSON Dns.
October, 1841.

Martin, J. delivered the opinion of the court.

**NOTE
TO
BRAZEALE.**

The defendant Brazeale is appellant from a judgment against him and the other endorser of a promissory note, originally given by one B. F. Chapman, as the price of three slaves, which he purchased from the plaintiff for \$4644. When the note became due, the last day of grace was on Sunday, the 18th February, 1838. The note was protested in New Orleans, where it was made payable on Saturday, the 17th February, 1838, and notice delivered to the appellant, who was the first endorser, on the Monday following, two days after protest. Before instituting this suit, the plaintiff took out an order of seizure and sale against the slaves on his mortgage, and they were sold on 12 months credit for the sum of \$3160. This sale was made on the 6th of March, 1839, and the note and the ten per cent. interest accruing thereon, amounted to the sum of \$5194 72, which after deducting the amount of the sale of the slaves, left a balance at that date of \$1974 72, due on said note, which is the sum claimed in the present suit. Judgment is given for this sum, with 10 per cent. interest thereon, from the 6th March, 1839, until paid, against the endorsers.

The counsel for the defendant has urged, that the protest was illegally made on the 17th February, when the note became due on the 18th; and that the notice was improperly delivered to him personally in the city of New Orleans, while his residence is in the parish of Natchitoches.

Where the last day of grace for the payment of a note or bill is a Sunday or day of rest, the protest is properly made on the preceding day.

The 18th February, the last day of grace, being a Sunday, the protest was correctly made on Saturday, the 17th and preceding day. Acts of 1838, page 44, sec. 5.

Notice appears to have been served on the defendant personally. It is however urged, this is irregular; because the act of the 13th March, 1827, requires, that when the endorser does not reside in the place, where the protest was made, to put the notice in the nearest post office, addressed to him at his domicile or usual place of residence. This act makes mention of two modes of giving notice to the endorser; to wit: by service on

him, *personally*, or transmission through the post office. In *Western Dis.* directing the mode of transmission, the act refers only to *October, 1841.* cases, in which there is no personal service. In such cases, *GAS BANK* transmission of notice through the post office would be nugatory. When the notice is served personally, the endorser has *positive* notice, and when it is transmitted to him through the post office, he has only constructive notice. It would be absurd to say, that after positive notice has been received, constructive notice is still to be given.

It has lastly been contended, that the certificate of the notary is evidence only of the transmission of the notice by mail; and that personal service of notice must be sworn to by the notary or the person who makes it. The first section of the act cited, requires the notary to state in his certificate the manner in which notice is *served* or forwarded, and of this, the act makes the notary's certificate evidence. 1 *Morreau's Dig.*, 76.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

GAS BANK vs. DESHA.

APPEAL FROM THE COURT OF THE SEVENTH DISTRICT FOR THE PARISH OF
CATARBOULA, THE JUDGE OF THE SIXTH PRESIDING.

Where the certificate expresses the name of the post office, to which notice to the endorser is sent, it is sufficient, without stating it is the *nearest* to his residence. A denial might put the adverse party on his proof, that it was the nearest.

The want of amicable demand cannot be pleaded, when the protest states, that demand was made of the maker of the note, and the endorser notified, that he would be looked to for payment.

Bankable interest is due on notes discounted in Bank, from the day of protest.

WESTERN DES.
October, 1841.

CAS BANK
VS.
BENNA.

This is an action against the endorser of a promissory note, for the balance due thereon of \$625, and interest.

The defendant pleaded the general issue, and denied specially his liability as endorser, or that he was in any way indebted.

On the trial the note and protest were offered in evidence. The notary's certificate was objected to by defendant's counsel, because it did not purport to be taken from a book kept for that purpose, and because it did not state, that notice was sent to the endorser's nearest post office. These objections were all overruled and judgment for the plaintiffs. The defendant appealed.

Mayo, for the plaintiffs.

Garrett, contra.

Garland, J. delivered the opinion of the court.

The defendant is appellant from a judgment rendered against him as the endorser of a promissory note for \$625, with interest thereon at the rate of seven per cent. per annum, from the 15th day of September, 1839.

He first contends there is no legal evidence of notice to him, "the only evidence being the certificate of the parish judge, which is not in accordance with the statute of 1821. The copy does not appear to have been taken from a book in which it was duly recorded under the signature of the notary and two witnesses." He relies on 1 Bullard & Curry's Dig., 41. The protest is signed by two witnesses, and the parish judge certifies it as "a true copy of the original extract in my office." The act of the 18th March, 1827, relative to the manner of giving notices to endorsers, seems to have escaped the attention of the counsel for the defendant. 1 Idem, 40-42. Under it the parish judge has acted, and we think has substantially complied with its provisions.

The next objection is, that it is not stated in the protest, that

the notice was directed to the post office nearest to the domicile or habitual residence of the defendant. The post offices, to which the notices were sent, are named in the certificate of the notary; the defendant has not denied in his answer, that the one for him was misdirected or that there was another post office nearer to him. Had he done so, the plaintiff would have been put on his guard as to the proof it was necessary to make, and might probably have been compelled to show the office, to which the notice was sent, was the nearest to the defendant. At any rate, the defendant might have discharged himself by showing, there was a post office nearer to him, than the one to which the notice was sent.

The defendant's plea of a want of an amicable demand will not avail him. The demand of payment on the drawer of the note and a notification to the defendant, that the holder looked to him for payment, is in our opinion a sufficient demand.

The Bank has a right to recover interest at seven per cent. per annum, from the day of the protest. The plaintiff is the holder of the note, which on its face shows it was made for the accommodation of the drawer. The inference, that it was discounted is irresistible. La. Code, art. 2895; Acts, 1835, p. 103, sec. 23.

In the plaintiffs' petition it is admitted, the sum of \$158 was paid on the 11th of October, 1839, yet judgment is entered for the whole amount of the note. This is an error we must correct. At the foot of the protest it is stated, that the sum of \$158 16 has been paid on the note. The defendant contends, he is entitled to credit for both sums. We have no doubt the sum stated in the petition is the same noted on the protest, and we shall only allow a credit for the latter sum.

The judgment of the District Court is therefore annulled, avoided and reversed; and this court proceeding to give such judgment as in our opinion ought to have been rendered in the court below, do further order, adjudge and decree, that the plaintiffs do recover of and have judgment against the defendant for the sum of four hundred and sixty-nine dollars and

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SAS BANK
OF
DESHA.

Where the certificate expresses the name of the post office, to which notice to the endorser is sent, it is sufficient, without stating it is the nearest to his residence. A denial might put the adverse party on his proof, that it was the nearest.

The want of amicable demand cannot be pleaded, when the protest states, that demand was made of the maker of the note, and the endorser notified, that he would be looked to for payment. Bankable interest is due on notes discounted in Bank from the day of protest.

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ninety-six cents, with interest thereon at the rate of seven per centum per annum, from the 11th day of October, in the year 1839, until paid, with the costs of protest and of this suit in the District Court, those of the appeal to be paid by the plaintiff and appellee.

191	466
48	255
191	466
108	186
108	187
108	188
19	462
117	236

BROWN vs. GUNNING'S CURATRIX ET AL.

APPEAL FROM THE COURT OF THE SIXTH DISTRICT, FOR THE PARISH OF
RAPIDES, THE JUDGE OF THE DISTRICT PRESIDING.

The obligation of sureties in a curator's bond is that the principal will administer the estate according to law; and his duty requires him to pay all the creditors equally and according to their rank.

A surety is only liable for the acts of the curator during the continuance of his bond; and for the proper application of the funds received during that time.

Judicial sureties are bound *in solido*; so each surety in a curator's bond is liable to the action of the creditors of the estate, for the whole amount claimed.

The action on a curator's bond against the sureties, is not prescribed by the lapse of one year. It is an action *ex contractu*.

This is an action against the curatrix of the estate of Wm. Gunning, deceased, and two of her sureties on her bond, to render them personally liable *in solido*, for failing to pay over the amount of the plaintiff's claim, which is allowed and he is placed on the tableau of distribution among the creditors of said estate. The case has already been before this court; 16 *La. Rep.*, 238.

The tableau of distribution placing the plaintiff thereon as a creditor and proposing to pay him with the other creditors on

said tableau, was homologated and the curatrix directed to pay accordingly, by a judgment of the Court of Probates, the 13th February, 1837. WESTERN DIS.
October, 1841.

The curatrix having failed to pay, the plaintiff instituted this suit on her bond, the 5th November, 1838. BROWN
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On the return of the case to the District Court evidence was taken to show the estate was solvent; or at least there were ample funds to pay the debts placed on the tableau and ordered to be paid.

The defendants among other defences interposed the plea of prescription.

There was a verdict and judgment for the plaintiff against the curatrix and one surety in solido for the sum claimed; and against the other surety for only a part. The defendants appealed.

The plaintiff asks judgment to be amended so as to be against all the defendants in solido for the whole debt and interest.

Dunbar & Hyams, for the plaintiff and appellee.

Bryce & Cochran, for the defendants and appellants.

Brewer, on the same side, made the following points:

1. A woman is incapable of acting as curatrix. A bond given as such is null and void; La. Code, art. 25; 7 Martin, N. S., 466.

2. The bond is without effect, because it is not such a bond as the law requires; not being for one-fourth over and above the amount of the inventory; Mrs. Gunning never took the oath as required by law, nor did letters testamentary ever issue; La. Code, arts. 1119, 1120; 6 Martin, N. S., 528; 1 Idem, 592; 5 Idem, 506; 6 Idem, 402; 6 La. Rep. 355; 11 Idem, 508; C. Pr. art. 924, No. 6, 981.

3. All actions of damages for mal-administration, neglect to perform the duties of curatrix, and all other damages resulting from *quasi offences*, are prescribed against in one year; La.

WESTERN DIS. Code, arts. 3501, 2204, 2295; 11 Toullier, pp. 156, 157; 6
October, 1841. Martin, N. S., 669; Semple et al. vs. Buhler; Fisk vs. Brow-

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GUNNING'S CU-
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der et al., 6 Idem, 691; Balfour vs. Browder, Ibid, 708.

4. The declaration of Gunning that he was principal in the note of C. Morgan & Brothers, and that Brown was only bound as surety, was improperly received as evidence against the parties in this suit.

5. The judgment must be reversed because it gives interest on a larger amount than is allowed by the verdict; Bedford et al. vs. Jacobs, 5 Martin N. S., 449; Idem, 462; 7 Idem, 235; 8 Idem, 263.

6. The judgment is for a greater amount than appears to be due by the evidence, even if Brown paid the note and was subrogated to the rights of Morgan & Brothers. The case must therefore be reversed and sent back to inquire into the extent of costs.

Garland, J. delivered the opinion of the court.

This case was before us at the last October term, on an appeal of the plaintiff from a judgment of dismissal for want of jurisdiction and remanded for a new trial; 16 La. Rep., 238.

The defendant, Sophia E. Gunning, was on the 22d of November, 1834, appointed by the Probate Court curatrix of the vacant estate of her deceased husband, Wm. Gunning. On the 14th of January, 1835, she gave bond for \$32,382, with the defendants, Barry and Leckie, and W. T. Crain, now deceased, as securities, the condition of which states that she has been appointed curatrix as aforesaid, and concludes that if she shall "well and truly execute the duties of her said appointment according to law," then the obligation is to be void, &c. On the 28th of November, 1834, at the request of Mrs. Gunning, the probate judge commenced an inventory of the succession, which consisted of an assortment of drugs and medicines, notes and accounts owing by various persons; lands, slaves and moveable property, and closed the same on the 5th of January, 1835, amounting to \$28,667. Shortly after which

the bond aforesaid was given, and she took possession of the estate. On the 27th of the same month, she presented a petition to the Probate Court, stating it was necessary for the payment of the debts that the property should all be sold, which sale was ordered by the court. The stock of drugs and medicines to be payable \$2000 on April 1st, 1835, and the balance in twelve months from the day of sale. The household furniture to be sold, all sums under \$50 cash, for that sum or more twelve months credit. One slave to be sold for cash. An improvement in the pine woods on a credit of one year; the balance of the real estate and slaves payable in one, two and three years, and the remainder of the personal property for cash. On the 28th of February, 1835, a sale was made on these terms.

Witnesses Dec.
October, 1841.

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SATRIK ET AL.

The stock of drugs and medicines sold for,.....	\$2,583 00
The household furniture was all sold to the same person on twelve months credit for,.....	449 00
The slave was sold for cash for,.....	865 00
The improvements in the pine woods sold for,.....	165 00
The other real estate and slaves sold for,.....	4,900 00
The remainder of the personal property sold for,....	158 00
	<u>\$9,060 00</u>

Several articles of household furniture seem not to have been sold.

The cash sales amounted to,.....	\$1,023 00
Cash on hand at the time of the inventory,.....	70 00
	<u>\$1,093 00</u>
Payment due on the 1st April, 1835,.....	2,000 00
Collected by Goodwin in 1835, say,.....	1,250 00
	<u>\$4,343 00</u>

It seems she and her attorney collected on the debts owing the estate the further sum of,.....	1,807 00
Making,.....	<u>\$6,150 00</u>

WESTER DIX.
October, 1841.

SHOWN
vs.

BURNING'S CU-
RATRIX ET AL.

The curatrix proceeded with her administration of the estate, without further authority from the probate judge, until the 25th of February, 1836, when she presented to him a statement of the debts of the succession, which she proposed to pay, representing the succession as solvent. On the same day, the judge ordered this statement or tableau to be advertised according to law, but whether it was ever done does not appear. On the 13th of February, 1837, the Probate Court ordered the debts to be paid according to this statement, so far as they are liquidated and extended on the same. In this statement the debt claimed by the plaintiff is put down in the name of the persons under whom he claims, for the full amount of the principal, and it is stated to be bearing ten per cent. interest from May 1st, 1831, and a blank is left for the amount of costs.

On the 27th of February, 1836, the curatrix presented to the parish judge, what she called an account of her administration for the year, in which she represented she had paid debts to a large amount, and collected about the sum heretofore stated, which the judge says he has examined, and compared with the vouchers exhibited; and approves it, with the exception of one charge of \$6000, for which there is no voucher; he therefore continues her in the administration for another year. He also states the attorney for the absent heirs was present. This account, which represents a considerable balance in favor of the curatrix, with the judgment thereon, she filed in the Probate Court on the 1st of March, 1836, with a petition praying it be approved and that she be continued in her functions as curatrix. Together with these proceedings she filed another bond dated on the 29th of February, 1836, for the sum of \$26,300, the condition of which recites her continuance as curatrix, and concludes with a similar clause to account as the first bond. This last bond was signed only by Barry and Crain as sureties.

What has been done with the estate since the execution of this last bond, the record does not inform us. No account has been rendered in any shape, although a judgment directing the

curatrix to render one was procured by one creditor in February, 1838, and another judgment ordering her to account was rendered in February, 1840, at the instance of the present plaintiff and other creditors, both of which have been disregarded.

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October, 1841.

BROWN
vs.
GUNNING'S CUR-
ATRIX ET AL.

On the two bonds, executed as aforesaid, Mrs. Gunning and her sureties, Leckie and Barry, are sued. The plaintiff says he has paid the debt that was owing to Morgan & Brothers, and is now entitled to recover it; that it was placed on the statement or tableau which was homologated and the amount ordered to be paid. Various breaches of the bond are assigned; among them that Mrs. Gunning has collected large sums which she has not paid to the creditors or accounted for; that she has not paid his (plaintiff's) debt, as directed; that she has wasted the estate and otherwise disposed of it contrary to law, wherefore she is responsible to pay the debt claimed.

The defendants have interposed a variety of exceptions, some of which have been disposed of by the judgment of this court sustaining the jurisdiction of the District Court; the others do not seem to require a detailed notice, but we think the court acted correctly in overruling them all.

In their answers to the merits, the sureties specially allege the solvency of the succession, and say it is the fault of plaintiff, he has not made the curatrix pay the debt. She and they admit the debt to be owing to plaintiff, but say it amounts to no more than \$1657 53, as appears by the statement or tableau, which has been homologated. There is a general denial as to any waste or neglect, and of any responsibility to pay; there is also an allegation on the part of the sureties that the plaintiff cannot subrogate them to his rights if they are condemned to pay.

There was a verdict against all the defendants for the sum of \$470, with interest at 10 per cent. per annum from the 1st of March, 1837, until paid, and against Mrs. Gunning and Barry for the sum of \$2,197, with interest at 10 per cent. per

WHEREAS Dra. annum on \$1,187 88, part thereof from the 1st. of March, October, 1841.

BROWN
vs.
GUNNING'S CU-
RATRIX ET AL.

1837, until paid, and interest at the rate of 5 per cent. per annum on the sum of \$967 06, from the 1st of March, 1837, until paid. On which the court rendered judgment accordingly, against the parties *in solido*, from which all the defendants have appealed.

In the answers of the defendants, they admit the principal of the debt claimed, say it was placed on the statement or tableau which was duly homologated. We are then utterly unable to see on what ground they can refuse to pay the interest on that principal, which is as plainly stated as the principal itself. That the plaintiff has paid the debt to Morgan & Brothers as the surety of Gunning; the testimony fully satisfies us, and we see no force in the bill of exception taken to the admission as evidence of Gunning's statements, that Brown was his surety on the note, although he appeared to be bound *in solido* on its face.

But the defendants contend, that as they have shown by the account rendered to the Probate Judge, in February, 1836, that the curatrix has paid to creditors all the money she received previous to that period, they are in no manner responsible now. The obligation of the sureties is, that the curatrix shall administer the estate according to law. What then were her legal duties? The articles 1126, 1128, 1140, 1142, 1153, 1160, 1167, 1168, 1169, 1170, 1172, 1173, and others in the Civil Code, and articles 985, 986, 987, 988, and others point them out very distinctly. During the first year of her curatorship, the curatrix paid various creditors of the estate the full amount of their debts, without any authorization from the judge. But say the defendants, she was authorized by the judge afterwards, to pay those debts, and that is sufficient; the act is legalized by the judgment rendered on the 18th of February, 1837. Supposing that to be true, they forget the same order directed them to pay the plaintiff, or those under whom he holds, he therefore was as much entitled to be paid as any one else, and if the curatrix has preferred

The obligation of sureties in a curator's bond is that the principal will administer the estate according to law; and his duty requires him to pay all the creditors equally and according to their rank.

others to him, she and her sureties are responsible to him for the injury.

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An examination of the evidence in this case, and a reference to the laws we have quoted, will show the curatrix omitted in many particulars to do what she was required to do. In other respects she violated the law most palpably, and in no respect does it seem to us, she was disposed to do justice to all the creditors. If the curator or curatrix of a vacant estate chooses to proceed under the impression the succession is solvent, to pay a portion of the debts without a legal authorization, they may do so, but must answer for the consequences if any creditor sustains damage or loss thereby. The law regards all the creditors of the same class, as having equal rights, and one is not to be preferred to another, and it is no defence for the legal representative of an estate, or for his sureties, to say, that the funds have been used in paying just debts, if it appears one just debt has been paid in full, and another equally just has been neglected. It is to prevent this, the law requires a statement or tableau of all the debts to be presented to the judge, and his authority obtained, after having called on the creditors to present their claims. If there is money in hand to pay all the creditors, the article 1168 of the Code says plainly what is to be done. If there is not enough, the article 1169 is equally explicit in its provisions.

It is strongly insisted by the plaintiff's counsel, that Leckie is responsible for the acts of the curatrix after she gave the second bond, as the account she filed was not legally homologated. We do not think so. His liability is only for the acts of the curatrix up to the time of her second appointment, and for the proper application of the funds received previous to that date. That amount seems to have been about \$6,150; if, in the application of that sum, a portion of the creditors have been neglected, he is responsible to them for the sum they have lost thereby. This is the view which the court and jury seem to have taken of the case, and allowed the plaintiff his

A surety is only liable for the acts of the curator during the continuance of his bond; and for the proper application of the funds received during that time.

WESTERN Dm. *pro rata* share, in which we do not think there is any material error.
October, 1844.

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vs.
SUNNING'S CU-
RATRIX ET AL.

Judicial sureties are bound *in solido*; so each surety in a curator's bond is liable to the action of the creditors of the estate, for the whole amount claimed.

We cannot agree with the defendant's counsel, that the sureties are only jointly bound. They are judicial sureties, and as such, are bound *in solido* to the creditors of the estate, and the action is therefore well brought. The recourse which they may have on the estate of Crain, is not a matter with which the plaintiff has any thing to do.

We have attentively examined the plea of prescription filed in this court, and the authorities relied on to sustain it. We think it must fail. This is an action arising *ex contractu* on the bonds given by the parties, not one sounding in damages

The action on a curator's bond against the sureties, is not prescribed by the lapse of one year. It is an action *ex contractu*.

for an offence or *quasi* offence. The cases in 6 Martin N. S. 665, 691; were both actions against the sheriffs personally for damages, and not actions on their official bonds, alleging breaches thereof. Had such been their character, we imagine the decision of this court would have been different from what it is.

The judgment of the District Court is therefore affirmed with costs.

SHIPMANS & Co. vs. ARCHINARD.

WESTERN DIS.
October, 1841.APPEAL FROM THE COURT OF THE SIXTH DISTRICT FOR THE PARISH OF
RAPIDES, THE PARISH JUDGE PRESIDING.SHIPMANS & CO.
vs.
ARCHINARD.

The guarantor of a note is a competent witness on the part of the maker, in a suit by the endorsee against the latter; for it is the interest of the witness, that the plaintiff should recover, and he is called upon to testify against his own interest.

So where plaintiffs received the note sued on *after maturity*, the defendant may produce in evidence the letter of the payees and original holders, to show, that the suit was premature, and that *a certain time* had been allowed for payment.

This is an action against the maker and endorsers of a promissory note; the endorsers, W. P. & T. Hickman, "guarantying the payment of said note, and waiving demand, protest and notice."

The defendant, Archinard, admitted the execution of the note, but averred the plaintiffs had no right to sue, and that the suit was premature; the payees and holders agreeing after it became due, and before its transfer, to wait *a certain time for payment*. That they had transferred the note in violation of said agreement, to the knowledge of the transferees, the present plaintiffs.

Interrogatories were propounded touching the defence; but on the trial evidence and a witness to prove the defence, were rejected and a bill of exceptions taken.

There was judgment against all the parties to the note *in solido*, and Archinard, the maker, alone appealed.

O. N. Ogden, for the plaintiffs.

Dunbar & Hyams, for the defendant.

Martin, J. delivered the opinion of the court.

The defendant and appellant has placed this case before us on a bill of exceptions to the rejection of the testimony of William P. Hickman, and of a letter from W.P. & T. Hickman, the

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October, 1841.

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vs.
ARCHIBARD.

payees of the note sued on, to the defendant, the maker. The witness was offered to prove, that the suit was premature; he had guaranteed the payment of the note to the plaintiffs, the endorsees, who had received it after its maturity; and the judge informs us, he was rejected on the following ground: "That a person or persons, who had guaranteed and secured absolutely the payment of an obligation, the tenor of which showed it to be due and exigible, cannot be permitted to come into court and show by their testimony, that the action is premature." The plaintiff and appellee has drawn our attention in support of the opinion of the first judge to the case of *Lesassier, curator, vs. Hurtzel et al.*, 8 Martin, N. S., 265, in which the defendant, to support the plea of novation, offered as a witness his surety, who had become the principal debtor in the obligation sued on; which had wrought the novation of the first. We were of opinion, that the lower court had not erred in rejecting him, because "if it were true, that he engaged to pay the debt of the principal, then it follows, that he was interested to defeat this action; because the principal, if condemned, would have a right to call on the witness for the debt and the costs incurred by the failure of the latter to discharge the obligation." In that case it was the interest of the surety to protect Hurtzel and defeat the plaintiff's action. In this action it is the interest of Hickman, the witness, to support the plaintiff's claim, and to have the defendant, his principal, condemned; for an effectual recovery by the plaintiff would annihilate the witness's obligation as a guarantor. This case is the converse of that relied on by the present plaintiff. In the one, the discharge of the defendant would give him a claim against the witness; in the other, the success of the defendant would leave the witness liable to an action, which would be destroyed by the plaintiff's effectual recovery. The witness therefore was, in our opinion, improperly rejected, as he was called upon to testify against his own interest. 4 M. R., 472; 4 Martin, N. S., 172. The bill of exceptions is silent as to the reasons which influenced the court in the rejection of the letter. The

The guarantor of a note is a competent witness on the part of the maker, in a suit by the endorsee against the latter; for it is the interest of the witness, that the plaintiff should recover, and he is called upon to testify against his own interest.

plaintiff had received the note after its maturity; the maker therefore was entitled to every equitable defence, which he might have opposed to the payees, whose letter was offered as evidence of an obligation, which the defendant contended, they had incurred, to forbear suing him. It ought for these reasons to have been received.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed, as well as the interlocutory judgment overruling the defendant's exception to the prematurity of the suit; all proceedings between the interlocutory and final judgments set aside; and the case remanded for a new trial upon the exception, with directions to the District Court, to admit the testimony of W. P. Hickman and the letter of W. P. & T. Hickman: the plaintiff and appellee paying the costs of the appeal.

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EXECUTORS
VS.
COPELEY &
JESUP.

So where plaintiff received the note sued on after maturity, the defendant may produce in evidence the letter of the payees and original holders, to show that the suit was premature, and that a certain time had been allowed for payment.

BROWN'S EXECUTORS vs. COPELEY & JESUP.

19 473
c114 445

APPEAL FROM THE COURT OF THE SEVENTH DISTRICT, FOR THE PARISH OF

OUACHITA, THE JUDGE OF THE SIXTH PRESIDING.

According to the provisions in articles 379, 380 and 381 of the Code of Practice, the vendee of a slave, when sued for the price, will be allowed time to cite in warranty the person to whom he sold, and who promised to pay the debt, although the plaintiff, or original vendor, never accepted him as his debtor.

This is an action against the principal and his surety on a note of \$810, given for the price of a slave, purchased by Copley at the probate sale of S. D. Brown's estate.

WESTERN DIS.
October, 1841.

BROWN'S
EXECUTORS
VS.
COFFEY &
JESSUP.

The defendants admitted the execution of the note and its consideration. They averred, that Copley sold the slave to one A. D. Peck, who covenanted and bound himself to take up their note to the plaintiffs. They annexed the act of sale to Peck to their answer, and prayed for time until the next term, to cite him in warranty. They also pray for the same judgment over against him, that may be rendered against them.

The district judge overruled the call in warranty, and the defendants excepted. There was judgment for the plaintiffs, and the defendants appealed.

McGuire, for the plaintiffs and appellees.

Downs & Copley, for the defendants.

Garland, J. delivered the opinion of the court.

The defendants are appellants from a judgment rendered against them for the price of a slave purchased by Copley at the Probate sale of the estate of Samuel D. Brown, deceased, for which he and his co-defendant gave their promissory note. Some time after, Copley sold the slave to one Peck, who expressly covenanted and agreed to pay the note of defendants to Brown's estate, and in all things in relation to said note to save them harmless. In the court below, the defendants in their answer set forth all the facts, and attach to it a copy of the sale to Peck, and call upon him to defend them, and asked the legal delay to have their warrantor cited. This was objected to by the plaintiffs' counsel, and the court overruled the motion, and the defendants excepted. This is the only point in the cause, and we think the court erred in not granting the delay. The articles 379, 380 and 381 of the Code of Practice seem too clear and imperative to admit of doubt or construction. In the case of *Anselm vs. Wilson*, 8 La. Rep., 37, it was held, as there was no privity between the plaintiff and Erwin, who was to reimburse the note to defendant, that delay would not be accorded to call him in. The agreement in that case was not that Erwin would pay the plaintiff the defendant's debt, but in

case she had to pay it, he (Erwin) would reimburse her. The contingency in that case was, not to operate on Erwin, until it was known, whether defendant had to pay. The court, in that case, went as far as it well could, to avoid the effect of a positive law, which in its operation in the country, is calculated to produce delay in the collection of debts, and considerable embarrassment to creditors.

WESTERN DIS.
October, 1841.

HOUGHTELING
vs.
FISHER.

We are bound to execute the law in all cases, however hard its operation may be, when it appears, its provisions are not seized upon to evade the administration of justice, and the collection of just debts. In this case, we see nothing in the conduct of defendants at all suspicious.

The judgment of the District Court is therefore annulled and reversed, and this case remanded to the District Court, with directions to permit the defendants to call Alexander Peck in warranty, and otherwise to be proceeded in according to law; the plaintiffs paying the costs of this appeal.

HOUGHTELING vs. FISHER.]

APPEAL FROM THE COURT OF THE TENTH DISTRICT, FOR THE PARISH OF
NATCHITOCHES, JUDGE CAMPBELL OF THE DISTRICT PRESIDING.

A new trial should not be granted, to enable the party to prove the tender of a slave in a redhibitory action, on the ground of an oversight in his counsel to prove it on the trial, when it does not appear, any diligence was used to procure the proof.

The discretion in the Supreme Court, to remand causes for a new trial, will be exercised only in extreme cases, when the party has shown due diligence and is guilty of no laches.

WESTERN DES.
October, 1841.

RODENTELING
VS.
HARRIS.

This is a redhibitory action. The plaintiff alleges, he purchased a slave named George from Mrs. Sarah L. Fisher, for \$1000. That he is subject to redhibitory defects and vices, which entitle him to a rescission of the sale. He avers, he has tendered back said slave to the agent of the defendant, who peremptorily refused to receive him. He prays judgment for a rescission of the sale and return of the price, and 600 dollars in damages.

The defendant pleaded the general issue. There was first a verdict for the plaintiff and a new trial granted.

On the second trial there was no proof produced of a tender of the slave, and there was a verdict and judgment for the defendant. After an unavailing effort to obtain a new trial, the plaintiff appealed.

Taylor, for the plaintiff and appellant.

Dunbar & Hyams, for the defendant.

Morphy, J. delivered the opinion of the court.

This suit was brought to obtain the rescission of the sale of a slave on the ground of redhibitory vices and maladies. The plaintiff at first obtained a verdict, but on a motion for a new trial, it was set aside. The second jury gave in their verdict in favor of the defendant. After an unsuccessful effort to set it aside, a judgment was entered, from which plaintiff has appealed.

He has drawn our attention to the affidavit he presented to the judge below, in support of his application for a new trial; he sets forth in it, that previous to the institution of this suit he had made a formal offer, in the presence of three witnesses, to deliver back the slave to Wm. Hunter, the agent of defendant; that Hunter refused to receive the slave in positive terms; that he was prepared to prove the tender of the slave to defendant, but that owing to the oversight of his counsel, the proof was not made, and that irreparable injury will be done

to him, unless a new trial be granted. This application was further supported by the sworn declaration of one of the three witnesses, referred to in plaintiff's affidavit, that in June, 1840, he did, at the request of the plaintiff, together with two other persons, accompany him, (the plaintiff,) when he was going to offer Hunter, defendant's agent, to take back the slave; that in their presence the tender was made, but that Hunter peremptorily refused to receive him.

WESTERN DIS.
October, 1841.

HOUGHTALING
VS.
FISHER.

We are requested to remand this case for a new trial, and not to suffer the plaintiff to be the victim of an oversight of his counsel. If it appeared clearly from the affidavit, that the witnesses to prove the tender of the slave, had been duly summoned and were in attendance, but not examined through an oversight of the counsel, the plaintiff would perhaps have had some claim to relief at our hands; but it does not appear, that any steps were ever taken, to procure their attendance in court. From an examination of the record it further appears, that the tender of the slave was not proved even on the first trial, and it is perhaps the very ground, on which a new trial was granted. The discretionary powers conferred on this court to remand causes, will be exercised only in extreme cases, when the party has shown due diligence, and is guilty of no *laches*. Should we remand this cause on the ground submitted to us, we might be called upon to do it in almost every case, where through neglect, oversight, or any other cause, the party or his counsel may fail to adduce material evidence on the trial.

A new trial should not be granted, to enable the party to prove the tender of a slave in a redhibitory action, on the ground of an oversight in his counsel to prove it on the trial, when it does not appear any diligence was used to procure the proof. The discretion in the Supreme Court, to remand causes for a new trial, will be exercised only in extreme cases, when the party has shown due diligence and is guilty of no *laches*.

It is therefore ordered, that the judgment of the District Court be affirmed with costs.

WESTERN DIS.
October, 1841.

PEETS vs. WILSON.

PEETS

vs.

WILSON.

191 478
45 1106

APPEAL FROM THE COURT OF THE TENTH DISTRICT FOR THE PARISH OF

CLAIBORNE, JUDGE CAMPBELL PRESIDING.

A mortgage executed by the maker of a note, to secure the endorsers, becomes null when there are no steps taken to fix their liability; and the transfer to the holder of the note after the endorsers are discharged for want of protest and notice, confers no rights on the transferee.

The fact of an endorser taking a mortgage from the maker of a note to indemnify him against loss, does not dispense with demand, protest and notice.

This is an action of mortgage. The plaintiff alleges he is the assignee and transferee of a mortgage on two half-quarter sections of land, executed by one R. Stiles to Canfield & Drake to secure them against their endorsements on two notes of his and that said mortgage was given to secure the payment of said notes. The debt claimed amounts to \$458, for which he prays judgment against Wilson on his said mortgage, and that the land be sold to satisfy the debt.

Wilson claimed the land as having purchased it at sheriff's sale, under an execution against Stiles, which issued on a judgment of R. Thompson.

The mortgage was executed by Stiles to Canfield & Drake, the 16th January, 1839, to secure the payment of the debt arising on the notes they had endorsed; but after they were over due, and no steps taken to fix the liability of the endorsers.

The land in contest was sold the 21st day of May, 1839, subject to plaintiff's mortgage, by the deputy sheriff, and Wilson, the principal sheriff, became the purchaser for \$150.

There was judgment for the defendant and the plaintiff appealed.

Lawson, for the plaintiff and appellant.

Hyams and *J. Blair Smith*, for the defendant.

Morphy, J. delivered the opinion of the court.

This is an hypothecary action by which a tract of land held by defendant as a third possessor is sought to be made liable for two notes amounting together to \$458 38, drawn by one Richard Stiles to the order of Rueben Drake and Martin Canfield, and by them endorsed over to the present plaintiff *after maturity*. This transfer took place on the 12th of February, 1838, and suit was immediately brought on them by attachment against the maker, Richard Stiles. On the 16th of January, 1839, Richard Stiles was prevailed on by Drake & Canfield to give them a mortgage on the property now in the possession of the defendant, to secure the payment of these notes which he mentions in the act of mortgage as being in the hands of Peets. This mortgage was recorded in the office of the parish judge of Claiborne, on the 21st of January of the same year, and by the said Drake & Canfield assigned to the plaintiff on the 25th of September following. The defendant purchased the property thus mortgaged by Stiles at a sale under execution, made at the suit of Thompson, a judgment creditor of the latter who levied on it on the 25th of March, 1839.

WESTERN DIB.
October, 1841.

PEETS
vs.
WILSON.

This case has been argued in writing and not without some ingenuity on both sides. It is urged on the part of the defendant and appellee that if the mortgage assigned to plaintiff and under which he claims was given to Drake & Canfield to secure them from the consequences of their endorsements on the notes, as is alleged in the plaintiff's petition, the mortgage was a nullity. That it could have no binding force and effect because Stiles was not indebted to them at the time it was given; as the notes had been by them transferred to the plaintiff nearly a year previous to its date; and that it is essential to the existence of a mortgage that there should be a principal debt to serve as a foundation for it. That when a bill or note is endorsed after maturity, demand must be made within a reasonable time and notice given to the endorser who is otherwise discharged, and that as in this case the plaintiff took no step to fix the liability of Drake & Canfield, the mortgage, if it

WHEATLEY DR.
October, 1841.

**FRETS
 vs.
 WILSON.**

ever had validity, was discharged ; the object for which it was given having been accomplished. To this, it is answered that the endorsers were not discharged by want of notice and demand, as they had taken a mortgage to secure themselves. That even if they were they had a right to waive the discharge and avail themselves of the benefit of the mortgage, at least against subsequent creditors and purchasers ; that the expressions in the act of mortgage and the act of assignment would be alone sufficient to render them liable unto plaintiff ; and that at all events defendant has no right to complain as the whole transaction took place and the mortgage was recorded before he had acquired any right whatever to the property ; and he is not shown to have ever been a creditor of Stiles. That he bought with full knowledge of the prior mortgage and cannot now be allowed to contest its validity. From a close examination of the whole context of the mortgage to Drake & Canfield, it is quite clear to us that the instrument was intended to secure them from the consequences of their endorsements on the two notes of the mortgagor. It was based then on a consideration

A mortgage executed by the maker of a note to secure the endorsers, becomes null when there are no steps taken to fix their liability ; and the transfer to the holder of the notes after the endorsers are discharged for want of protest and notice, confers no rights on the transferee.

The fact of an endorser taking a mortgage from the maker of a note to indemnify him against loss, does not dispense with demand, protest and notice.

which did not exist at the time ; the principal obligation to which it was to attach had already been released by the laches of plaintiff ; the mortgage was in their hands a useless piece of paper, conferring on them no rights whatever of which they could avail themselves or which they could transfer to others. It was an absolute nullity ; La. Code, articles 3251 and 3252. From the circumstances disclosed by the record in relation to the attachment previously sued out on these notes by the plaintiff against the maker, Stiles, it is altogether improbable that the latter could have intended that the mortgage should in any case enure to his benefit ; he knew that the notes were in plaintiff's hands and what was more simple than to give the mortgage directly to him ; but his intention, as alleged by the petitioner himself, was to save Drake & Canfield harmless of endorsements. We have held (9 La. Rep., 334,) that the fact of an endorser taking a mortgage from the maker of a note to indemnify him against loss, does not dispense with demand

and notice of protest; still less can it have the effect of reviving a liability already extinguished by the want of such demand and notice. But it is said that defendant being a third possessor and having bought the property subject to this mortgage recorded before his purchase, has no right to contest its validity. The sheriff's return does not show that the property was sold subject to this mortgage, or that the bid of plaintiff was over and above its amount. It states, it is true, that the certificate of the recorder of mortgages showing the existence of this prior mortgage was read, but it further states that the property was absolutely sold for one hundred and fifty dollars, leaving doubtful what should have appeared with certainty from his return, to wit: that the bid was over and above the amount of the prior mortgage. By articles 679 and 683 of the Code of Practice, it is made the duty of the sheriff to announce that the property is sold subject to the prior mortgages, and that the purchaser is authorized to retain in his hands out of the price for which the property will be adjudicated the amount of such mortgages and give his bond for the surplus. The return of a sheriff must show a strict compliance with the requirements of the law, and we cannot presume the fulfilment of material formalities which do not appear on its face; from this return the bid appears to us to have been given for the absolute value of the property; 4 Martin, N. S., 162. If such was the case, no adjudication could have legally taken place, the price offered being less than the prior mortgage apparently existing on the property; C. Pr., 684; 3 Martin, N. S., 604. The defendant then, when called upon, under such circumstances, to pay the amount of the prior mortgage or abandon the property, has the right of showing that such prior mortgage was a nullity, that his bid was for the absolute value of the property, and that the adjudication under which he holds was a valid one. This we think he has satisfactorily shown.

It is therefore ordered that the judgment of the District Court be affirmed with costs.

WILSON, Dec.
October, 1881.

PEPTE
vs.
WILSON.

CASES IN THE SUPREME COURT

WESTERN DIS.
October, 1841.

HUEY vs. DRINKGRAVE.

HUEY
vs.
DRINKGRAVE.

APPEAL FROM THE COURT OF THE SEVENTH JUDICIAL DISTRICT FOR THE
PARISH OF OUACHITA, THE JUDGE OF THE FIFTH PRESIDING.

Evidence taken down at the instance of the plaintiff, cannot be stricken out, on the cross-examination, on the ground that it contradicted or went to explain a written contract and was inadmissible. The motion to strike it out came too late; the objections should be stated when the testimony is offered.

This is an action to recover \$350, the balance due on a note given for the sale and purchase of plaintiff's improvement on United States land. The act of sale was passed in August, 1839, and expresses on its face, that the plaintiff sells *a certain improvement* on government land, for the sum of \$1,675. He prays judgment for the balance due.

The defendant pleaded the general issue; avers he is entitled to a credit on his note of \$1,325, and by a special agreement is not to pay interest. He further avers that the plaintiff is indebted to him in the sum of \$300, for 300 barrels of corn, which he gathered from the plantation, and which is now pleaded in compensation.

The plaintiff had judgment on the evidence adduced. His witnesses proved that the plaintiff did not sell the corn, then on the land; and on their cross-examination defendant's counsel ascertained there was no other contract between the parties but the written one, or act of sale, and that the evidence was illegal, and should be stricken out, but which was refused, and he took his bill of exceptions. The defendant appealed.

Downs & Copley, for the plaintiff, insisted that parol evidence was admissible in this case. There was no real estate sold; only improvements, &c. 4 La. Rep. 22; 16 Idem 232.

McGuire, for the defendant, urged that his motion to strike out the parol evidence on the cross-examination was in time, and the motion should have been sustained. The illegality of the testimony could not be discovered until on the cross-examination, it was clear the witnesses were testifying as to the

construction of a written contract. It was not too late then to strike it out; and this principle is supported by Phillips on evidence.

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October, 1841.

HUEY
vs.
BRINKGRAVE.

Morphy, J. delivered the opinion of the court.

This action is brought to recover \$350, being the balance of a note of a larger amount drawn by defendant to the order of plaintiff. The defence set up is a plea in compensation of three hundred dollars for three hundred barrels of corn, alleged to have been sold and delivered to the plaintiff, at the rate of one dollar per barrel. There was a judgment below in favor of the plaintiff, from which the defendant has appealed.

The evidence shows that plaintiff's claim is for the residue of the price of a sale he had made to defendant of an *improvement or settlement* by him made on public land, together with some negroes, cattle, farming utensils, &c. There was at the time a crop of corn standing on the land, of which no mention is made in the conveyance. Some time after, the plaintiff gathered and removed from the premises all the corn as his property, without any positive opposition on the part of defendant, who was then on the plantation. It is the value of this corn which the defendant offsets against plaintiff's demand, on the ground that plaintiff had no right to take it away as it passed with the sale of the settlement to him.

On the trial, several witnesses were offered to prove that on various occasions, after the sale, the defendant had acknowledged that the corn belonged to the plaintiff, and had not been sold to him; after this testimony had been taken down, the defendant's counsel moved the court to strike it out, on the ground that it also appeared from the evidence that no subsequent contract had intervened between these parties; that it went to contradict or explain a written contract, and was inadmissible. The judge, in our opinion, correctly overruled this motion. It came too late; the party should have stated his objections to the testimony offered before it was taken

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October, 1841.

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vs.
SMART.

down. As to its effect when once taken, this court has frequently held, that it will bind the parties even in regard to the sale of real property. 1 Martin N. S. 456; 4 La. Rep. 22 and 64. The testimony leaves no doubt in our minds that the standing crop of corn was not included in the sale, and had remained the property of the plaintiff.

It is therefore ordered that the judgment of the District Court be affirmed with costs.



191 484
48 346

LECOMTE vs. SMART.

APPEAL FROM THE COURT OF THE SIXTH, NOW TENTH DISTRICT, FOR THE
PARISH OF NATCHITOCHES, THE JUDGE OF THE SEVENTH PRESIDING.

The southern and south-west boundary of the county and parish of Natchitoches runs from the junction of the Rigolet de Bon Dieu and Red River, in a direction as far south of west as will strike the Sabine River at the point where the north-west corner of the county of Opelousas touches the western bank of that stream.

In settling and determining boundaries not fixed by actual observation and survey, some weight must be given to general understanding and common acquiescence.

Title papers are admissible in evidence in a possessory action, to show the extent and limits of the plaintiff's possession; although no inquiry can be had as to the validity of titles in this action.

Where a person takes possession of land under an apparent title as his own, slight acts will be received as evidence of an intention to take actual possession.

But where a man without any pretence of title, goes upon land claimed by another, he must show unequivocal acts of possession, more than a year, to maintain the plea of prescription.

This is a possessory action, instituted in April, 1838, and citation was served on the defendant the 10th May following.

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October, 1841.

The plaintiff alleges he is the owner of two square leagues of land situated in the parish of Natchitoches, and embracing the small Prairie of Lannacoco with the adjacent wood-land; that the defendant within a year ago, took possession, without any shadow or pretence of title, of a part of said land, and is cutting timber, cultivating and committing trespass and waste thereon, to his great damage. He prays that the defendant be condemned to leave the premises and pay damages.

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vs.
SMART.

The defendant excepted to the jurisdiction; averring he resided in the Parish of Rapides. This exception was overruled. The general issue and prescription of one year was pleaded.

On the evidence produced, the District Judge was of opinion the defendant was a possessor in bad faith, without any pretence of title, and that the plea of prescription was unavailable. There was judgment for the plaintiff quieting him in his possession of the premises, and the defendant appealed.

Morse & Roysden, for the plaintiff.

Ogden & Brent, for defendant.

Garland, J. delivered the opinion of the court.

This action is instituted to recover the possession of a small tract of land which it is alleged the defendant has entered upon illegally, being a portion of a larger tract, which the plaintiff claims to possess as owner, situated in the Parish of Natchitoches, at a place called the Lannacoco Prairie.

The defendant excepts to the jurisdiction of the court, alleging he resides in the Parish of Rapides, where he should have been sued. This exception was overruled, after hearing testimony, the defendant filed a general denial, and pleaded the prescription of one year to the action. There was judgment against him, and he appealed.

The first question to be considered is, as to the jurisdiction

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October, 1841.

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vs.
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of the court, which involves the question of boundary between the Parishes of Rapides and Natchitoches. The line between the Parishes in this quarter has never been surveyed and marked; we are therefore left to form our opinions as to where it is intended to be, from the acts of the Legislature and the evidence in the record. The act of March 16, 1809, 1 Bullard & Curry's Dig. 173, says, "the line dividing the County and Parish of Natchitoches from the County and Parish of Rapides shall intersect the Red River at the confluence of the Rigolet de Bon Dieu, and shall run from thence *on the west in a direct line* to the nearest corner of the County of Opelousas, &c." The French text is, "*se prolongera de là vers l'ouest en ligne directe jusqu'à la première limite des Opelousas, &c.*" The difference in the meaning of the two texts creates some confusion. If, according to a portion of the English text, the line was to run directly west from the Rigolet de Bon Dieu, it is evident it could not be made to touch any portion of the County of Opelousas, as the line of that Parish is now understood. If, according to a part of the French text the line is to run directly to the nearest line (*première limite*.) of the County of Opelousas, its bearing would be nearly due south, and it would not go to any corner of that County, but intersect the supposed line at a place distant from any corner.

The southern and south-west boundary of the county and parish of Natchitoches runs from the junction of the Rigolet de Bon Dieu and Red River, in a direction as far south of west as will strike the Sabine River, at the point where the north-west corner of the county of Opelousas touches the western bank of that stream.

According to the first hypothesis, the *locus in quo* would be in the County of Rapides or Opelousas, according to the last, certainly in Natchitoches; but we do not think either supposition exactly correct. To ascertain the meaning of the Legislature, we have to take a portion of both texts, and we think the real intention is, the line shall commence at the junction of the Red River and the Rigolet de Bon Dieu, and run in a direction as far west of south as necessary to strike the Sabine River, at the point where the north-west corner of the County of Opelousas touches the western bank of that stream. Where that point is to be found, is not certainly known, and we are left very much to common report, and such maps of the State as are in our reach to fix it. We suppose that cor-

ner to be, very near if not exactly at the point where the base line or 31st degree of north latitude intersects the Sabine River. That the County of Rapides should extend to the Sabine River, is evident from a perusal of the act of September 5, 1812, 1 B. & C's. Dig. 174, defining the boundaries of the County of Natchitoches, which is said to be bounded "south by the County of Rapides" and west by the Sabine. If the County of Rapides was not to extend to the Sabine, the County of Natchitoches would join Opelousas.

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October, 1841.

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Assuming these principles as correct, if we draw a direct line from the confluence of the Red River and the Rigolet de Bon Dieu, to the point on the Sabine where the base line or 31st degree of north latitude intersects the Sabine, then according to the maps and the evidence, the Lannacoco Prairie, with the exception of a very small part, will be in the Parish of Natchitoches, if the line should bear more south, then all of it would be in that Parish.

As there is necessarily some uncertainty in making calculations from maps, as to lines not run, we have looked carefully into the parol testimony in relation to the domicile of the defendant. In settling a boundary not fixed by actual observation and survey, some weight must be given to general understanding and common acquiescence. Calvit, a witness, says he lives about eight miles south of the defendant, that he lives in Rapides, and he considers the people in the Prairie as also residents of that Parish. As to himself, he is probably correct, but as to the others, we think the weight of testimony is in favor of their being residents of Natchitoches. This witness further says, the residents of the Prairie vote and pay taxes in Rapides, but he names no one but himself who does. On the other side, Davion says, he has known the Prairie Lannacoco for fifty years, and always considered and understood it was in the Parish of Natchitoches. Burnet, formerly sheriff of that Parish, though not very positive, considers them in that Parish. A brother of the defendant who lives near him, and also sued in a similar action, is proved to have been on the tax

In settling and determining boundaries not fixed by actual observation and survey, some weight must be given to general understanding and common acquiescence.

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list in Natchitoches. The testimony of Lee and Plaisance go to confirm the views of the other witnesses. We therefore think the judgment of the District Judge, as to the jurisdiction, is not shown to be so erroneous as to authorize us to reverse it.

Before proceeding to the merits, our attention is called to a bill of exception taken by the defendant. On the trial, the plaintiff offered "as evidence a report of the commissioners of the land office, and other evidences of title," to the admission of which, the defendant, by his counsel objected, on the ground that no evidence of title could be given in this action; but the judge was of opinion the documents were admissible to prove the character and extent of plaintiff's possession, for which purpose they were offered. We think the judge did

Title papers are admissible in evidence in a possessory action, to show the extent and limits of the plaintiff's possession; altho' no inquiry can be had as to the validity of titles in this action.

not err. It is true no inquiry could be made into the validity of the title in this action, but it was evidence to show the extent of plaintiff's possession. He claimed to possess as owner two square leagues including the whole Prairie, and as he did not have it all enclosed, it was necessary to show how far his possession extended by an exhibition of papers purporting to be muniments of title.

On the merits, the plaintiff showed he and those under whom he claims, have for more than forty years possessed as owners, all of the Lannacoco Prairie and some of the woodland surrounding it. A *vacherie* has been kept there for many years; there were houses erected, and fences and enclosures made, some persons white or black were always there in possession for him or his ancestors, and a large stock of cattle ranged and grazed on the Prairie. The defendant not having any right, went upon the land, selected a spot on which he proposed to settle, and erected buildings, enclosed a field, and commenced making crops on the land, although he was informed before he commenced his operations, that the plaintiff claimed the land as owner.

We think the possession of the plaintiff is sufficiently established, and he must recover unless his action is pres-

tribed by one year. This is the principal reliance of the defendant, and we have carefully examined the evidence in relation to the character and length of his possession.

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October, 1841.

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SMART.

The citation was served on the defendant on the 10th of May, 1838. The conclusions we draw from the testimony of all the witnesses, who, in some respects contradict each other are, that the defendant went to the Lannacoco Prairie about the last of December, 1836, for the purpose of selecting a situation to settle. He made choice of a spot, planted a few peach trees, cut down some trees and made an enclosure, but of what kind or to what extent is not definitely shown. He staid but a short time, then went to Mississippi where he had business, remained some weeks, and returned to the Lannacoco Prairie for a few days; he then left, returned to his family in the Parish of St. Landry, a distance of many miles, where he remained, made a crop in 1837, and again returned to the place in question, the latter part of the year 1837, when he erected houses, made enclosures to the extent of from twenty to thirty acres, removed his family, and in 1838 made a crop on the place. The defendant contends he took possession of the premises in 1836, or early in January, 1837, and had never abandoned it, and as the action was not commenced until April, 1838, prescription runs against it. If the defendant had have taken possession of the land under an apparent title, we should regard slight acts as evidence of an intention to take possession, but when a man without any pretence of title goes upon land which he is informed is claimed by another, he must show unequivocal and continued acts of possession for more than a year, to maintain a plea of prescription. In this case, the plaintiff contends that if the defendant had possession in 1836, or in January, 1837, he had abandoned it, and his possession did not really commence until about December, 1837. Of this opinion was the District Judge, and we do not think he erred. The articles 3999 and following, of the Civil Code, relied on by the counsel for the defendant, do not, in our judgment, go to the extent he

Where a person takes possession of land under an apparent title as his own, slight acts will be received as evidence of an intention to take actual possession.

But where a man without any pretence of title, goes upon land claimed by another, he must show unequivocal acts of possession, more than a year, to maintain the plea of prescription.

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October, 1841.

EMMONS
VS.
EMERY.

desires. The defendant was distinctly informed the plaintiff had a claim to the land in question, his establishments were there, and there is but little merit in the plea, that he went openly and publicly, and took possession of property which he knew did not belong to him, in violation of the rights of another. We do not think the defendant's plea of prescription will avail him.

The defendant complains the judgment is so indefinite, it cannot be executed. The plaintiff claims to be the possessor of two square leagues covering the whole Lannacoco Prairie, and some of the surrounding wood-land; the judgment accords it to him, the evidence shows he possesses all the Prairie and the wood-land surrounding, which is shown to include the place where the defendant has his houses and enclosures; of these the defendant is adjudged to be the wrongful possessor, and from which he is to be ejected. There is an obvious distinction between this case and that in the 3 La. Rep. 409, relied on in the argument.

The judgment of the District Court is therefore affirmed with costs in both courts.

PEPPER ET AL. vs. DUNLAP.

WRITEN Dtd.
October, 1841.APPEAL FROM THE COURT OF THE FIFTH DISTRICT FOR THE PARISH OF
MADISON, JUDGE TENNY PRESIDING.PEPPER ET AL.
vs.
DUNLAP.

The debtor alone has the right of enjoining proceedings under executory process without giving security. His vendee or the third possessor of the mortgaged property cannot.

On the dissolution of injunctions the damages should only be estimated on the amount actually due at the time of granting the injunction, or the *sum actually enjoined*, and not on notes or instalments of the same debt becoming due during the pendency of the injunction.

This suit commenced by an order of seizure and sale, which the plaintiff's obtained on their vendor's privilege and mortgage against a certain plantation and slaves in the possession of R. G. Dunlap, their vendee.

The defendant took an appeal from this order to the Supreme Court. See the case in 16 La. Rep., 163.

The cause was remanded for new proceedings. In the meantime, on the 18th April, 1839, two days after granting the order of seizure and sale, and after an appeal was taken therefrom, Hugh W. Dunlap, the now defendant, purchased out the interest of his brother. After the return of the cause to the District Court, and when the mandate of the Supreme Court was about being executed, to wit: on the 16th February, 1841, the present defendant in the original suit, applied for and obtained an injunction against the order of seizure, without giving security. He set up various grounds and defects in the title, but none of the causes authorizing an opposition and injunction to an order of seizure and sale without giving security were enumerated.

The plaintiffs whose proceedings were enjoined moved to dissolve the injunction on various grounds; among which were that the act of sale contained the clause or *pact de non alienando*, and that the present defendant and purchaser could not avail himself of this mode of proceeding, which was only accorded to the original debtor, &c.

There was a mass of evidence taken on the issues made up

WESTERN DIS.
October, 1841.

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vs.
DUNLAP.

between the parties, respecting the title to a portion of the land embraced in the original purchase and sale. The question turned entirely in this court on the right of the defendant to maintain his injunction without having given security.

There was judgment dissolving the injunction with ten per cent. damages and ten per cent. interest on \$22,500, which had then become due of the price of the plantation and slaves, instead of \$15,363, the sum due and actually enjoined at the suing out of the injunction. The defendant appealed.

Pepper, for the plaintiffs, and in propria persona.

Dunlap in propria persona.

Copley, on the same side.

Bullard, J. delivered the opinion of the court.

The plaintiffs having taken out an order of seizure and sale to enforce their mortgage and vendor's privilege upon certain lands and slaves sold by them to R. G. Dunlap, the latter prosecuted an appeal which came before us at the last term and the judgment of the District judge was affirmed. See 16 La. Rep., 163.

After the proceedings had recommenced in the District Court upon the mandate from this court being sent down, on 16th of February, 1841, Hugh W. Dunlap, who, it appears, had purchased the mortgaged property on the 18th of April, 1839, two days after the original order of seizure was issued and one day after the appeal had been allowed from that order, presented his petition and obtained an injunction to stay proceedings. The judge in granting the injunction exempted him from the obligation of giving security. The grounds upon which he asked for this equitable interference of the court, after expressing his surprise and astonishment that the plaintiffs had obtained an order of seizure and sale, and had caused the property to be advertized for sale, of which he was the bona fide owner, were: 1st. That the petitioners are not the

only heirs of the persons from whom they claim title to the land, but that there is another heir who is about to bring suit against him for her interest. 2d. That the vendors have not complied with the agreement to make R. G. Dunlap a good title, according to their contract, but that a part of the land belongs to the United States. 3d. That having no right to convey the section 22, an action of warranty has accrued to their vendee for the value of the land. 4th. That suit has been brought for one of the slaves; and further that certain persons are about to bring suit for four hundred acres of the land. It is further alleged that when the vendors were about to make the authentic conveyance, R. G. Dunlap called upon them to produce the title papers to the land, that he might examine them, and he was assured by James Pepper, who had made the contract for himself and the others, that the title papers were in the Citizens Bank in New Orleans, and that the title was good; whereas the title papers for section 22 never were filed in that bank but were in the possession of said Pepper, and that he would not have signed the notes for that part of the price, if he had known the real situation of the titles. It is also alleged that by the terms of the contract, R. G. Dunlap was entitled to all the bank stock which the vendors were entitled to in the Citizens Bank of Louisiana, as subscribers; the vendors having represented that they would be entitled to fifty thousand dollars of stock, yet that James Pepper, one of the vendors, with a view to defraud the said R. G. Dunlap, withdrew the subscription or released the same to the bank, without the consent of said Dunlap, and contrary to his interest.

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Such is the substance of the grounds for relief set forth in the petition for injunction, upon which that writ was ordered to issue without giving security.

The plaintiffs, whose proceedings were stayed, moved the court to dissolve the injunction with damages for the following reasons: 1st. Because Hugh W. Dunlap, the petitioner, is not the party defendant in said proceedings, and therefore not entitled to an injunction without giving security. 2d. Because

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from the showing of the plaintiff himself he acquired the property mortgaged since the order of seizure and sale issued, and therefore has no right to oppose the sale. 3d. Because the sale to R. G. Dunlap contains the clause *de non alienando* and consequently his conveyance to the present petitioner is void so far as the respondents are concerned, and he has no right to oppose the sale.

The court dissolved the injunction upon this motion and awarded damages against the plaintiff therein, at ten per cent. upon twenty-two thousand five hundred dollars and interest on the same from the 8th of March, 1841, till the 26th of May, 1841.

The debtor alone has the right of enjoining proceedings under executory process without giving security. His vendee or the third possessor of the mortgaged property cannot.

In dissolving the injunction upon some of the grounds set forth in the motion, we are of opinion the court did not err. The articles 738, 739 and 740 give to the *debtor alone* the right of enjoining proceedings under executory process without giving security. It is clear that the present plaintiff is not the debtor of the vendors of the mortgaged property. He acquired the property not only *pendente lite* but with the *pact de non alienando* in the original conveyance. That clause would deprive him even of the advantage of being treated as a third possessor, and by no means should it be considered as giving him the privilege of making opposition and arresting the proceedings of the hypothecary creditor without giving bond.

But even supposing that the defendant was entitled to all the privileges and advantages of the original purchaser it appears to us that even he would be bound to give security in a case like the present. The articles of the code above referred to set forth the causes for which proceedings may be arrested on opposition without giving security. They are all such as go to the discharge of the debtor by reason of payment, release, prescription or the like, since the date of the contract, or to the nullity of the contract itself for want of a free consent, as that it had been obtained by fraud, violence, fear or other unlawful means.. Although there is a suggestion of fraud in the petition as to that part of the contract which relates to the

bank stock, yet the party does not claim that the whole contract should be annulled on that or any other account.

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Although we agree with the court below that the injunction ought to be dissolved, yet we think a greater amount of damages was awarded than the statute justified. The damages should have been estimated at the time the injunction was obtained and not upon the notes which fell due afterwards. In this therefore the judgment must be reformed. There was due at that time a sum of \$15,363, instead of \$22,500, upon which the interest and damages were estimated.

On the dissolution of injunctions the damages should only be estimated on the amount actually due at the time of granting the injunction, or the sum actually enjoined, and not on notes or instalments of the same debt becoming due during the pendency of the injunction.

It is therefore adjudged and decreed that the judgment of the District Court be reversed; and proceeding to render such judgment as should, in our opinion, have been given below, it is further ordered and adjudged that the injunction be dissolved and that the defendants recover of the plaintiff in injunction interest at the rate of five per cent. upon the sum of fifteen thousand three hundred and sixty-three dollars from the 8th of March, 1841, until the 24th of October, 1841, and five per cent. damages on the said amount, the costs in the District Court to be paid by the plaintiff and appellant, those of the appeal to be paid by the defendants and appellees.

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WOODBURN vs. FRIEND ET AL.

WOODBURN
vs.
FRIEND ET AL.

APPEAL FROM THE COURT OF THE SEVENTH DISTRICT FOR THE PARISH OF

OUACHITA, THE JUDGE OF THE FIFTH PRESIDING.

Sureties in bonds taken in judicial proceedings are bound *in solido*; being entitled to neither division nor discussion: so several sureties in a 12 months bond are each bound for the whole sum.

Where the creditor does not suspend his execution so as to put it out of his power, or the surety (if he should pay,) to pursue the debtor, it is no prolongation of the time of payment.

When it appears in the progress of the trial, that a payment has been made of part of the debt; although the injunction may have to be dissolved for want of an allegation of payment, yet a new one for this amount should be granted and perpetuated.

Where the party is entitled to a new injunction *instante* for a part of the debt on the dissolution of the first, he will not be mulct in damages.

This case commenced by injunction. The defendant, Friend, by his attorney took out execution on a 12 months bond signed by P. G. Oliver, as principal, and by the plaintiff, and two others as sureties, under which plaintiff's property has been seized by the sheriff to satisfy the entire bond. He avers he only signed as surety and cannot be liable for more than his share, to at least one third. He further states that the defendant held up his execution and gave a prolongation of time to the principal in the bond, until he gathered and disposed of his crop, and is now insolvent. He prays that Friend, and the sheriff be enjoined and prohibited from proceeding in said seizure, and that he be released from all liability on the bond, and the injunction be made perpetual.

The defendant pleaded the general issue, and called on the plaintiff to prove his allegations in a summary manner, and that the injunction be dissolved with damages.

The evidence showed that a quantity of cotton had been shipped by Oliver, the principal in the bond, to the knowledge of Friend and his attorney, which should have been seized, as it was shipped long after the bond became due.

There was judgment dissolving the injunction, with ten per cent. interest, and 50 dollars as special damages for attorney's

fee, against the principal and surety *in solido*. The plaintiff WESTLEY DIX.
October, 1841. appealed.

Garrett, for the plaintiff.

Copley, for the defendants.

Bullard, J. delivered the opinion of the court.

The plaintiff having signed a twelve months bond, as surety of Oliver, together with two other sureties, in favor of Friend, and execution having issued upon it, and levied upon the plaintiff's property, he obtained an injunction to stay proceedings, on the allegation that he signed the same as joint surety with his co-sureties, Robertson and Warfield, who became equally and jointly bound with him, and that he is in no event bound for more than one third; but that the sheriff has seized more property than is necessary to pay the whole bond. He further alleges that he is not liable for any part of the bond, because after it fell due on the 24th day of July, 1840, Friend, the obligee, granted a prolongation of term of payment to Oliver, the principal, without the consent of the plaintiff his surety; and agreed and promised to wait with him until he should have gathered his cotton and corn crop, then growing on the land which was mortgaged to secure the payment of the twelve months bond; and that an execution which had issued upon the bond was returned into the clerk's office, by order of Friend's counsel, that the crop was more than sufficient to pay the whole bond, and that in consequence of the laches of Friend he can no longer subrogate the surety in his action against the principal who has become insolvent.

The injunction was dissolved with damages, and the plaintiff appealed.

The first ground upon which the injunction was granted, is clearly untenable. Sureties upon bonds taken in judicial proceedings are bound *in solido*, being entitled neither to discussion nor division.

Sureties in bonds taken in judicial proceedings are bound *in solido*, being entitled to neither division nor discussion: so several sureties in a 12 months bond are each bound for the whole sum.

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The facts shown in relation to the second ground, to wit: the granting of prolongation of the term of payment to the principal debtor without the consent of the surety, are, that an execution was issued in August, not long after the bond fell due; that it was not served, and was finally returned in November or December; and that in the meantime the crop of Oliver, the principal, amounting to about sixty bales, was disposed of, and that ten bales of it went into the hands of Mr. Copley, the attorney of Friend, who had ordered out the execution, and who afterwards personally took it to the office after it had run out, and the deputy clerk swears, *wished him to alter the dates*, which witness declined. It appears that Friend agreed to suspend the execution if Hemphkin would agree to it, and that the execution was not levied. It is further shown that Mr. Copley received two hundred dollars for Friend, which was paid by order of Oliver by Mr. Bry, who had shipped the crop.

Where the creditor does not suspend his execution so as to put it out of his power, or the surety (if he should pay,) to pursue the debtor, it is no prolongation of the time of payment.

When it appears in the progress of the trial, that a payment has been made of part of the debt; although the injunction may have to be dissolved for want of an allegation of payment, yet a new one for this amount should be granted and perpetuated.

In the case of Huie vs. Bailey, which was a much stronger one than this, we held, that permitting the principal debtor to go to Texas without the consent of the endorser, upon a promise to pay on his return, did not discharge the latter. In all such cases there must be a suspension of the right to sue by a valid contract, for if the surety might at any moment pay and pursue the debtor under the legal subrogation, he is not discharged by the delay accorded to the debtor. We cannot regard the two hundred dollars paid the attorney, as a consideration for suspending the execution, because this is not proved. 16 La. Rep. 219.

The injunction was properly dissolved, but as it appeared in the progress of the trial that \$200 had been received by the counsel of Friend, for that amount the court ought in our opinion, at once to have granted a new injunction, and if it had been made the subject of complaint in the petition, would have authorized the court to perpetuate the injunction *pro tanto*, and in that event no damages could have been given under the act of 1831. 11 La. Rep. 483.

Equity forbids that under such circumstances the party should be mulcted in heavy damages in obedience to the literal tenor of the statute; for it amounts to the same thing whether the first injunction be partially sustained or a new one allowed *instanter*.

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It is therefore adjudged and decreed that the judgment of the District Court be avoided and reversed, and proceeding to render such judgment as ought, in our opinion, to have been given below; it is further adjudged and decreed that the injunction be dissolved with costs, except for the sum of two hundred dollars for which it is rendered perpetual, reserving to the plaintiff the right, if any he have, to be further credited for the ten bales of cotton alleged to have been delivered to the attorney of the defendant, and that the defendant pay the costs of this appeal.

Where the party is entitled to a new injunction *instanter* for a part of the debt on the dissolution of the first, he will not be mulct in damages.

SELBY vs. BASS ET AL.

APPEAL FROM THE COURT OF THE NINTH DISTRICT, FOR THE PARISH OF CARROLL, JUDGE TENNY PRESIDING.

Where a party having two-capacities, takes possession of property, and it is doubtful in which capacity he holds, the legal presumption is that he takes in the capacity the law authorises, and that he will do what it is his duty to do.

So where the widow causes an inventory to be made of her deceased husband's estate, and omits to put some articles in it; renounces the community, but acts as administratrix and as tutrix of her minor children; and then as executrix under a will found, and pays some debts without the order of the judge, she is not liable as intermeddler, when there is no attempt at concealment or fraud shown.

This is a suit against Martha A. Bass, late wife of D. O.

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HELENY
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Barton, and now wife of W. A. Benton, claiming from her individually the sum of \$5060, which the plaintiff alleges, is due to him from the estate of her late husband for counsel fees, and a note of D. O. Barton for \$3500; for all of which he alleges, she has made herself liable by intermeddling and taking possession of her deceased husband's estate illegally, &c. He prays judgment against her individually; and also against her present husband.

The defendant, Madame Bass, denied her liability or that she was guilty of intermeddling; and averred, that whatever she did, was by the advice of the plaintiff, as her legal adviser and attorney at law.

There was judgment, under the pleadings and the evidence produced, in favor of the plaintiff, and against the defendant, for the sum of \$4,930, with 10 per cent. interest on the amount of the note; and 5 per cent. on the remainder. She appealed.

McGuire & Garrett, for the plaintiff and appellee.

Copley & Downs, for the defendant.

Garland J. delivered the opinion of the court.

The plaintiff alleges, that Martha A. Bass, late widow of David O. Barton, and now wife of W. M. Benton, is indebted to him the sum of \$5,060, with interest at 10 per cent. per annum on \$3,500, from the 16th of March, 1838, and 5 per cent. on the remainder, from judicial demand. This claim is alleged to be made up as follows:

1st. Of a note of \$3,500, with 10 per cent. interest, as claimed, which David O. Barton in his lifetime had given to plaintiff.

2d. Of the sum of \$60, which D. O. Barton owed plaintiff as a lawyer's fee in a suit, wherein he represented Barton.

3d. A sum of \$50, also a lawyer's fee, owing by Barton for services rendered him.

4th. The sum of \$270, also a lawyer's fee, in a suit in which plaintiff represented Barton and wife.

5th. The sum of \$80, another fee as Barton's counsel in
 suit No. 127. WESTERN DIS.
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6th. The sum of \$50, also a fee as Barton's counsel in another
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7th. Another fee of \$50, for services as counsel in preparing
 title papers.

8th. That after the death of D. O. Barton, the defendant, his
 widow, employed the plaintiff as sole counsel, to advise and
 represent her in the settlement of the succession. He was to
 act as such counsel until the succession was settled. In this
 capacity he assisted in having Mrs. Barton confirmed as tutrix
 of her minor child, attended to having an inventory made, ad-
 vised and drew up an act, whereby Mrs. Barton renounced the
 community of acquets and gains, had her appointed admin-
 istratrix, and advised and acted for her and various other mat-
 ters relating to the succession. He also says, that in con-
 sequence of being so retained, he refused various large fees in
 cases against the said succession, for all which he claims the
 sum of one thousand dollars.

It is further alleged, that after the death of D. O. Barton, the
 defendant, his late widow, took possession of all his property,
 amounting to about \$40,000, and appropriated it to her own
 use. That she examined the papers belonging to the succe-
 sion before the seals were placed on them. That she did not
 include in the inventory all the property belonging to the suc-
 cession, but concealed a part with the intention of appropriat-
 ing it to her own use, by means of all which acts she has made
 herself personally liable, to pay the demands of the plaintiff
 against the succession of D. O. Barton. The marriage of Mrs.
 Barton with W. M. Benton is alleged, and a judgment *in solido*
 asked against them.

The defendants for answer deny the plaintiff's allegation
 and demands, especially those charging an interference with or
 concealment of any portion of the effects of the succession.
 They set up the renunciation of the community by Mrs. Bar-
 ton, under the advice of the plaintiff. That she always acted

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by his advice and under his counsel, and if she ever did any act in relation to said succession, whereby she incurred any responsibility, it was the result of the plaintiff's counsels and advice, and she is not responsible to him, and he cannot take advantage of them.

The evidence shows, that the plaintiff did render various services as an attorney and counsellor at law for D. O. Barton in his lifetime, also in one case for his wife, for which \$270 is charged. It is also shown, plaintiff advised Mrs. Barton to renounce her interest in the community, and drew up the act for her. He took the necessary steps to have her confirmed as tutrix of her minor child, attended the making of the inventory, and did other acts as the retained counsel of the estate. His claims for services seem established, and there is very little contest on that part of the case or as to the note for \$3,500, given by Dr. Barton to plaintiff. The liability of the late Mrs. Barton, to pay those debts, is the principal question in the case.

David O. Barton died on the 4th of January, 1839; some days after the plaintiff, as counsel for the widow, presented a petition to the probate judge, stating that fact, that there was a minor child, a considerable amount of property, and other usual circumstances, and concludes by a prayer for appraisers and the taking of an inventory. On this petition on the 15th of the same month, the judge made an order directing an inventory to be made, and he actually made one on the 26th day of said month; the plaintiff being himself present, acting as the adviser and lawyer of defendant. At the taking of that inventory, the probate judge testifies, he saw nothing like unfairness on the part of Mrs. Barton, that there appeared to be a perfect understanding of fairness on her part, his own and the plaintiff's. He does not know of any conduct of Mrs. Barton since her renunciation, to make him believe she was disposed to act dishonestly towards the estate. When the first inventory was made, it appears, some funds in the hands of a commission merchant in New Orleans and some articles of moveable pro-

perty were not put on it, but afterwards, when the widow renounced, a supplemental inventory was made; which included a carriage and horses and other things, but the document is not in the record. The probate judge says, Mrs. Barton took charge of the estate as administratrix andatrix of her minor child, with benefit of inventory and a renunciation on her part of the community of acquests and gains. She made an inventory of all the papers in presence of the plaintiff, and never, to the knowledge of the parish judge, did anything to induce a belief, she intended to act unfairly, but appeared anxious to inventory every thing belonging to the community. From other witnesses we learn, she always expressed great anxiety to manage the affairs of the succession properly and not involve herself in any liabilities, and in her correspondence and interviews with plaintiff manifested much solicitude about her situation, and that of the succession of her deceased husband. From her letter to plaintiff, written a few days after the inventory, she seems anxious, that a Mr. Chambliss should have the management of the estate, and expresses her apprehensions he will not agree to take it. She urges the plaintiff to see him and persuade him to accept, and if he will not, she tells the plaintiff she would be glad, if he would undertake it, as she knows her situation, and wants to get some one, who will do her justice. At other times she expresses her solicitude, and about two months after the inventory, upon receiving a message from plaintiff, informing her she must not proceed further in the management of the estate, she writes in a style of honest alarm, and begs him to visit her immediately, and inform her of her "danger in that matter."

The crop of cotton made on the plantation in 1838 was put on the inventory, afterwards sent to New Orleans, sold and the proceeds applied to the payment of a debt owing by the estate. Other debts of the estate were paid by the widow, without any particular order from the probate judge, with funds belonging to the estate used for the purposes; but the justice of those claims is not denied. There was a man's saddle in the posses-

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sion of another person, when Doctor Barton died, which was not put on the inventory, but the witness says, he did not inform the widow he had it, until sometime after the inventory was closed. She then took it and sold it to a neighbor to pay an undisputed debt of the estate. It seems, a pair of timber wheels were also sold to another creditor to pay a debt of \$100. A horse, that had been purchased on credit, was given back to the vendor. These acts and the payment of a debt with the funds in New Orleans, are all, that are proved to show an embezzlement or conversion of the property to her own use. No evidence was given to show, the papers were examined previous to the inventory, and they could not have been with much care, as more than two months after a testament was found among them, which left the widow a portion of the estate, and appointed her executrix.

As soon as the will was found, the defendant by the plaintiff, as her counsel, presented a petition to the probate judge informing him in detail of all the circumstances, states she is a legatee, and has also been named sole executrix, without being required to give security, and prays, that the will be probated and she qualified as executrix; all of which was done. The business went on, as the parish judge says, without the executrix suing any one or being sued for any debt, that he knew of. In the early part of the year 1840, she rendered an account of her administration, and the probate judge says, it has been ordered to be homologated.

About the month of June, 1839, the defendant said to one of her neighbors, that her first impressions were, that she would have nothing to do with the estate, but after consultation with her brother, "she had agreed to take charge of the estate, and she thought she would be able to pay all the debts very easily." At other times she said, "she had concluded to take the property and pay the debts," as her brother advised it, and the plaintiff does not appear to have advised her otherwise.

The succession, although indebted to a large amount, is not

alleged or shown to be insolvent, on the contrary, its solvency is admitted. WITNESSETH
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Upon these facts the plaintiff attempts to make the widow of D. O. Barton personally responsible for his debts, under the articles 993, 994, 1054, 2367 of the Civil Code. The District Judge gave a judgment for the plaintiff, from which the defendants appealed.

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The two last articles relied on by the plaintiff say, "the widow or heir who has concealed or made away with any of the effects of the succession, or partnership, or community of gains, is declared to have accepted the succession or to be concerned in common unity, notwithstanding his or her renunciation." It may well be questioned under this law, whether it is not indispensably necessary, that some fraudulent intent must appear to make a widow responsible for the debts of her husband, or an heir for those of his ancestor; but that is not very material, as it is not shown in this case, that the defendant, previous to the inventory and renunciation made by her, concealed or made away with a single article of property belonging to the succession, nor did she endeavor to prevent the judge and appraisers from making an inventory of all the estate. If there was any fraud, concealment or management in making the inventory, or renunciation, which we do not believe, the plaintiff is as much involved in it as the defendant, and cannot profit by it. He was the principal agent and adviser, and is *particeps criminis*, if any thing is wrong. The case of Ford vs. Ford, 1 La. Rep., 201, is widely different from this, and does not sustain the plaintiff in his position.

To enable the widow to renounce, she must by art. 2362 make an inventory in the same manner as the beneficiary heir, which has been done in this case.

But it is alleged, the defendant is responsible under the article 993 of the Code, having disposed of certain property, without the consent of the judge, to wit: the crop of cotton, the saddle, the wheels and the horse heretofore mentioned. To understand the proper application of this article of the

WESTERN DIS. Code, others must be considered. In the first place, the article
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is founded on the assumption, that the heir has not made an inventory or renounced the succession, and any act of the kind mentioned without authority, is taken as evidence of his intention not to renounce to, but to accept, he is therefore liable to pay the debts. A tacit acceptance of a succession is supposed from some act, that indicates an intention. La. Code, art. 982; 1 Martin, N. S., 202; 2 Idem, 422. Various acts may indicate that intention, and there may sometimes be an actual intermeddling with the property of a succession, and yet the person not be liable as heir; on the other hand, there are some acts which are foreign to a succession, and yet manifest a will to accept. La. Code, arts. 983, 985, 986; 2 Martin, N. S., 556; 4 Toullier, No. 331; Poth. Commun., No. 538. The intention must be united to the fact, or rather manifested by the fact. La. Code, arts. 984-987. Those acts of property which the person called to the succession, can only do in the quality of heir, necessarily suppose an acceptance, because he acts as owner. Art. 988. But the person called to the succession does not commit an act as heir, by disposing of property belonging to it by another title, than that of heir; as if he should be testamentary executor and heir at the same time, provided, in so disposing of the property, he does not assume the quality of heir; Idem, arts. 988, 989; and with regard to those acts, which may be differently interpreted, it is necessary to distinguish acts of property from acts of administration or preservation, or preparatory acts. The time must also be taken into consideration. Idem, arts. 990, 991.

Where a party having two capacities, takes possession of property, and it is doubtful in which capacity he holds, the legal presumption is, that he takes in the capacity the law authorizes, and that he will do what it is his duty to do.

When a party, having two capacities, takes possession of property, and a question arises as to which he holds under, it is a legal presumption, he takes in the capacity the law authorizes. That is, he will do what it is his duty to do. *Omnia rite esse acta*. 2 Starkie, 673.

When these principles are applied to the facts of this case, it will be seen, that previous to the inventory the defendant had done no act to make herself liable for the debts. If any acts of

fraud, embezzlement or concealment occurred in the taking the inventory, we have before said, the plaintiff is as deeply involved as she is, and cannot profit by them. After the inventory and renunciation, it is clear from the evidence of the parish judge, she acted as administratrix and tutrix of her minor child. After the will was found and ordered to probate, she was then in possession as executrix, and authorized to administer the estate as such, and has so administered ever since so far as the record shows us. If she shall mal-administer, she is liable for her acts, and can be sued in the proper tribunal, and made responsible. If as executrix, she chooses to pay the debts without the authority of the judge of probates, she can do so, and is responsible, if any creditor, heir or legatee suffers damage or injury by it. The succession is admitted to be solvent, and no tableau of distribution is necessary. If she delays the payment of the debts still owing, the creditors can institute the proper proceedings against her as executrix, and enforce payment. The plaintiff, therefore, has a remedy for all his legal rights,

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For the amount of the note for \$3,500, and interest, for the counsel fees alleged to be owing by D. O. Barton, previous to his death, and for the services rendered by plaintiff as attorney and counsellor in the settlement of the succession, the estate of David O. Barton is responsible, and that portion of his claim must be dismissed, without prejudice to his rights hereafter. As to the claim against the defendant, M. A. Bass, personally, for services rendered and advice as counsel previous to the inventory and renunciation, and at the time of making the latter act, she is responsible in this action, also for the fee in the case of Bowen against her, which was a matter affecting her interests, arising previous to her marriage with D. O. Barton, but as the evidence does not enable us to fix with any certainty the value of those services, we must remand the case for a new trial.

The judgment of the District Court is therefore annulled, avoided and reversed, and all of the plaintiff's demand founded

WESTERN Dn. on the promissory note set forth in the petition, also all his
October, 1841. claims against David O. Barton for fees, as his attorney and
PATTERSON counsellor at law previous to his death; also for fees as attor-
vs. ney and counsellor in the settlement of his succession, are dis-
BONNER. missed without prejudice to his legal rights; in relation to the
 two claims against the defendant personally for counsel fees,
 the case is remanded to the District Court, to be proceeded in
 according to law, the plaintiff and appellee paying the costs of
 this appeal.

~~CONFIDENTIAL~~

PATTERSON vs. BONNER.

ON A RE-HEARING IN PART.

The vendee in a conditional sale or *vente à réméré*, has a greater analogy to a usufructuary than to any other bailee of the property of another, as regards the fruits or increase.

Neither the usufructuary or vendee in a sale à *réméré*, can make the children or young of slaves, born during their possession, *their own*.

In this case a re-hearing was granted "so far as relates to the plaintiff's claim to the children born of the slaves during the time they were in possession of the defendant.

The sole question to be decided here is, do the children or fruits of slaves in a *vente à réméré*, born or accrued during the time they are in possession of the vendee, belong to the vendor on the redemption, or to the vendee?

Elgee, for the plaintiff.

Myrins, for the defendant.

Martin, J. delivered the opinion of the court.

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A re-hearing has been granted on a judgment, which we gave in this case in October, 1839; as far as relates to the plaintiff's claim to the children born during the time the slaves were in possession of the defendant. (See 14 La. Rep., 236.) The defendant-resists the plaintiff's claim on the ground, that the young of slaves are natural fruits, and further, that they are natural augmentations; La. Code, 537. It is true, the articles quoted expressly state, *that the children of slaves are natural fruits*; this is under the title of usufruct; yet in the preceding article 536, the Code expressly says, that the children of slaves are excepted from the natural fruits, which belong to the usufructuary. From these, it clearly follows, that as far as relates to the usufruct, the children of slaves are not natural fruits. The possession of the vendee in a sale à *rémeré* has a greater analogy with that of an usufructuary, than that of any other bailee of the property of another. We therefore think, that the former has the same, but no greater right to the fruits of the thing in his possession than the latter, under the present Civil Code. But the present case is to be tested by the provisions of the former Code, under which this sale à *rémeré* was made. That Code does not expressly state, like the present, that the children of slaves are natural fruits, but it places those children on a quite different footing from the young of animals, which both Codes consider as natural fruits. Civil Code, p. 118, art. 42. The law therefore, in regard to the usufructuary was not changed by the new Code, neither do we think, that it was with regard to the vendee in a sale à *rémeré*; neither of them could, nor can make the children born during their possession their own. We conclude therefore, that the plaintiff has a right to recover the children born during the possession of the defendant. This was our opinion, when we gave the judgment; but the member of this court, who was then our organ, used the expression, "the slaves named in the petition," instead of, the slaves claimed in the petition.

The vendee in a conditional sale or vente à *rémeré*, has a greater analogy to a usufructuary than to any other bailee of the property of another, as regards the fruits or increase.

Neither the usufructuary or vendee in a sale à *rémeré*, can make the children or young of slaves born during their possession, their own.

WESTERN DIS. It is therefore ordered, that the judgment be amended
October, 1841. accordingly, and thus amended, remain in full force.

**BARTON'S
 EXECUTRIX
 vs.
 HEMPKN.**

=====

BARTON'S EXECUTRIX vs. HEMPKN.

194	510
104	608
19	510
114	701
19	510
117	806

APPEAL FROM THE COURT OF THE SEVENTH DISTRICT, FOR THE PARISH OF

OUACHITA, THE JUDGE OF THE SIXTH PRESIDING.

Fractional townships fronting on water courses are surveyed in small tracts or lots of about 160 acres each, and numbered, but the lot or fractional section numbered 16, is not designated by law as school lands. It is only under the general laws, and where the township is surveyed in square sections that every 16th section is reserved as school land.

In fractional or irregular townships on water courses the secretary of the treasury is required by law to select and designate the school lands.

The chief clerk in the general land office, being designated by law to act as commissioner in case of vacancy, &c., he is therefore an officer known to the law, to be recognized as such and presumed to be acting in obedience to the law.

Registers and receivers are to decide on the facts and sufficiency of proof in cases of pre-emption when no fraud exists; but if they sell land excepted from or not subject to sale by law, their acts are void for want of authority.

The commissioner of the General Land Office may at least suspend if not annul titles granted by the register and receiver, until Congress or the courts can act thereon.

The mere statement of the commissioner of the General Land Office that he has cancelled a certificate of purchase given by the register, &c., is not an eviction which should rescind a sale between third persons.

This is an action to rescind the sale of certain *floats* or rights

to a quarter section of land. The plaintiff alleges that Lifles & Carrick being entitled to a pre-emption on quarter section No. 8, township 19, &c., were entitled to *floating* rights of 80 acres each, by virtue of their settlement rights, to be *located elsewhere*; that the defendant purchased them and had them located on fractional section No. 16, in township 20, range No. 13, &c., which is contrary to law, every 16th section being reserved for school lands.

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October, 1841.

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EXECUTRIX.
vs.
HUMPHIN.

The plaintiff further shows that her late husband purchased said lots or *floats* so located for \$3200, on which he paid \$1184 and gave his notes for the balance. That since said sale these locations have been declared null by the acting commissioner of the General Land Office, as having been illegally located on school lands. She prays that said sale be rescinded, and that the defendant be decreed to return the part of the price paid, and that the notes be given up, &c.

The defendant pleaded the general issue; admitted the sale of the floats as located by him, but avers the title and locations are legal and good; he denies that they have been legally cancelled or annulled; or that in fractional townships bordering on water courses the 16th number or fractional section is reserved for school lands. He prays that the plaintiff's demand be rejected.

Upon these pleadings and issues the case was tried.

In this case the locations were made on the 16th section or fractional section of a fractional township fronting on the Mississippi; and on the certificate of entry and purchase being sent to the General Land Office at Washington, J. M. Moore, chief clerk and acting commissioner of the General Land Office, wrote a letter to the register and receiver of the Ouachita district, cancelling the certificate on the ground that the location of the *floats* or pre-emption rights had been made on school lands. This is the main question involved in the case; whether this section was by law reserved for school land and had the commissioner authority to cancel the certificate?

WESTERN DIS. There was judgment for the defendant and the plaintiff appealed.
October, 1841.

BARTON'S
EXECUTRIX
vs.
HENKIN.

Downs, for the plaintiff.

McGuire for the defendant.

Garland, J. delivered the opinion of the court.

This is an action to recover the sum of \$1000, which it is alleged the defendant received from the testator of the plaintiff, on account of the sale of a tract of land, to which the latter had no title.

It appears the defendant was the owner of two claims of about 80 acres each, commonly called *floats*; he located them on the lot or fractional section No. 16, in township 20, north range 13 east, which is a fractional township. He paid the money to the receiver of the public monies at Ouachita, who gave a receipt for the same, which would entitle the holders or assignees to a patent for the land, if all the proceedings had been legal and regular. This receipt was assigned to Barton at defendant's request, by the original pre-emptors, Liles & Carrick, for which Barton gave defendant his notes for \$3295 98, payable at different dates, upon which \$1000 have been paid. Barton took possession of the land and has held it ever since, without any actual disturbance, so far as we are informed. This receipt was sent to the General Land Office to obtain a patent, in reply to which application, J. M. Moore, acting commissioner, states in a letter addressed to the register and receiver at Ouachita, that, "the *floats* being located on section 16, which is land reserved by law for the use of schools, I have cancelled the certificate." He then proceeds to direct the officers to return to the parties, the money paid by them for the land. This has not been paid, nor has any further step been taken in the matter. The land in the fractional townships fronting on the Mississippi, was in compliance with the acts of Congress; 1 Land Laws, p. 576, 587; surveyed in tracts of

53 poles front by 465 poles in depth, containing about 160 superficial acres. One of these lots was numbered 16, and the acting commissioner of the General Land Office says, it is reserved for the use of schools in that township. That it is not exempted from sale under the general laws reserving the 16th section in every township from sale for the use of schools, is certain; for they apply to whole townships, and probably to those surveyed in square sections only.

The plaintiff says the title has been annulled, and if this lot is not reserved under the general law, her counsel say it has been selected under the act of Congress of May 20th, 1826, entitled "an act to appropriate lands for the support of schools in certain townships and fractional townships, not before provided for;" 1 Land Laws, 912. The second section of this act directs the secretary of the treasury in the cases provided for in the first section, to select certain quantities of land for the use of schools. In obedience to this law, the commissioner of the General Land Office by a general circular dated May 24th, 1826; 2d vol. Opinions and Instructions relative to Public Land, p. 395; directed the different registers of the Land Offices to cause selections to be made of the land to which each township or fractional township was entitled and to forward a list of such selections (designating numbers, &c.,) as should be made, to him, to be submitted to the secretary of the treasury for his approbation. In this case it does not appear that any such selections or lists have been made and forwarded for approval, or that the lot in question was ever selected under the act of Congress. It was not reserved from sale unless selected under the law, and the commissioner does not say it was. From the expression he uses in his letter, we infer it was not, though there is no certainty about it.

The annulling of the certificate by the acting commissioner of the General Land Office, the plaintiff says is an eviction and entitles her to demand a rescission of the sale and a judgment for the \$1000, and a return of the out-standing notes. The defendant's counsel denies the sale and certificate is void

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October, 1841.

BARTON'S
EXECUTRIX
OF
HENDRICK.

Fractional townships fronting on water courses are surveyed in small tracts or lots of about 160 acres each, and numbered; but the lot or fractional section numbered 16, is not designated by law as school lands. It is only under the general laws, and where the township is surveyed in square sections that every 16th section is reserved as school land.

In fractional or irregular townships on water courses the secretary of the treasury is required by law to select and designate the school lands.

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October, 1841.

BARTON'S
EXECUTRIX
vs.
HEMPHIL.

and annulled, and further denies the power of the acting commissioner of the General Land Office to cancel and annul it. He also denies the authority of Mr. Moore to act in the matter.

The act of Congress of the 4th of July, 1836, reorganizing the General Land Office, gives the commissioner a general supervision and control in relation to all public and private land claims, sales and patents, under the direction of the President of the United States; 1 vol. Laws, Opinions and Instructions relating to Public Lands, p. 552, sec. 1. The same authority was invested by previous laws; 1 Land Laws, 609. The second section of the above recited act, says, the President with the assent of the Senate, shall appoint two subordinate officers, one of whom is the principal clerk of the public lands and the other the principal clerk of private land claims, and in case of vacancy in the office of commissioner, or the sickness or absence of that officer, his duties shall be performed *ad interim*, by the principal clerk of the public lands. He is therefore an officer known to the law, and we are bound to recognize him and presume he is acting in obedience to the law. The supervision which the President has under the act reorganizing the General Land Office he charged the secretary of the treasury with, by a special order, dated on the same day the law was approved; 2 vol. Opinions and Instructions, 103, 104; so that all the operations of the General Land Office are under the immediate supervision of the secretary of the treasury, subject to the supervision of the President, whose duty it is, to see the laws are faithfully executed.

The chief clerk in the General Land Office, being designated by law to act as commissioner in case of vacancy, &c., he is therefore an officer known to the law, to be recognized as such and presumed to be acting in obedience to the law.

The 7th section of the act directs how documents and papers are to be certified under seal, to be used as evidence in courts of justice.

On the trial of this cause the defendant objected to the introduction as evidence of the letter of the acting commissioner of the general land office, on the grounds that no such officer was known to the law, and that he was not vested with power to cancel the certificate in question, the decision of the regis-

ter and receiver being final in the matter. The objections were overruled, and we believe correctly, though there was another objection which, if taken, might have been more serious. The District Judge correctly held the acting commissioner was an officer known to the law, and that the second objection went to the effect of the evidence.

Registers and receivers are the judges of the facts in cases of pre-emptions, so far as to decide upon the sufficiency of the proof, where no fraud exists, or is alleged, but if they sell land excepted from or not subject to sale by law, their acts are void for want of authority, and the commissioner of the general land office may at least suspend, if not annul titles granted by them, until congress or the courts can act on them. 2 Opinions and Instructions, 39, 84, 140, 214; 13 Peters 496; 13 La. Rep. 24; 11 Idem 587; Guidry vs. Woods, *ante*, 334.

If the evidence were before us, that the lot of land in question was reserved from sale for the use of schools under the general laws, or the particular provisions of the act of congress of May 20, 1826, we should not hesitate to decide upon it; but we do not think the mere letter of the commissioner of the general land office is sufficient. We wish to see whether this lot was selected by the register of the land office; at what time and in what manner the selection was made, and approved by the secretary of the treasury.

We do not consider the mere statement of the commissioner of the general land office, that he has cancelled a certificate, an eviction which should rescind a sale between third persons. The United States has not disturbed the plaintiff in the possession of the land, the purchase money has not been yet refunded, and the act by no means complete. It may be, there will be no disturbance, and it is possible that congress, upon a representation of the facts, and proof of the good faith of the parties, would pass an act affirming the sale. Many similar purchases have been ratified, as the journals and acts of that branch of the government will show. This court have on various occasions decided that acts and proceedings much

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October, 1841.

HARTON'S
EXECUTIVE
26.
HARTON.

Registers and receivers are to decide on the facts and sufficiency of proof in cases of pre-emption, when no fraud exists; but if they sell land excepted from, or not subject to sale by law, their acts are void for want of authority.

The commissioner of the general land office may at least suspend, if not annul titles granted by the register and receiver, until congress or the courts can act on them.

The mere statement of the commissioner of the general land office, that he has cancelled a certificate of purchase given by the register, &c., is not an eviction, which should rescind a sale between third persons.

WHITNEY DIS.
October, 1841.

BARTON'S
EXECUTRIX
VS.
HEMPKIN.

more potent than the act alleged in this case, did not amount to an eviction. 7 Martin N. S. 272; 8 La. Rep. 490; 3 Martin N. S. 111; 1 Idem 475; 8 Idem 390; 7 Idem 96; 16 La. Rep. 501.

The case in 17 La. Rep. 446; differs from this in a very important point. The plaintiff in that case only sold his *pretensions* to a tract of land, which both parties knew at the time did not belong to him, the legal and equitable title being in the United States: but in the present case, the officers of the United States have given such a certificate as to show a *prima facie* title out of the government; 10 La. Rep. 159; 11 Idem 322; and such as would have entitled the party to a patent, but for some intervening obstacle. In the first case no title passed, in this, there is a title which is perhaps void, but we cannot take the mere *ipse dixit* of the commissioner of the general land office that it is so.

In this case there is a final judgment for the defendant upon the verdict of the jury, which we think incorrect. The plaintiff has not made out such a case as will entitle her to recover, but we think the door should be left open to a further investigation of the matter. The action is premature, but the judgment should not be final.

The judgment of the District Court is therefore annulled and reversed, the verdict of the jury set aside, and a judgment of non-suit rendered against the plaintiff with costs in both courts.

BARTON'S EXECUTRIX vs. HEMP Kin.

WESTERN DIS.
October, 1841.

ON AN APPLICATION FOR A RE-HEARING.

BARTON'S
EXECUTRIX
vs.
HEMPKIN,

Where the plaintiff failed to make out her case by full proof, the court on consideration, set aside the non-suit and remanded the cause for a new trial.

Downs, for the plaintiff, applied for a re-hearing. He urged upon the court to change the judgment from one of non-suit, and allow the case to be remanded for a new trial.

Garland, J. delivered the opinion of the court.

Upon further consideration of the judgment rendered in this case, and upon the application for a re-hearing made by the plaintiff, the court is of opinion, the justice of the case will be promoted by setting aside the judgment of non-suit and remanding the cause for a new trial.

The judgment of the District Court is therefore annulled, and the verdict of the jury set aside as heretofore ordered; the judgment of non-suit set aside, and the cause remanded to the District Court for a new trial, to be proceeded in according to law, the defendant and appellee paying the costs of this appeal.

CASES IN THE SUPREME COURT

WESTERN DIS.
October, 1841.

TAYLOR, GARDINER & Co. vs. WOOTEN.

TAYLOR,
GARDINER & CO.
vs.
WOOTEN.

APPEAL FROM THE COURT OF THE SEVENTH JUDICIAL DISTRICT FOR THE

PARISH OF CALDWELL, THE JUDGE OF THE FIFTH PRESIDING.

19 518
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Where a commission is charged for *accepting*, none can be claimed, or a like commission charged for advancing, on the same sum or transaction.

A promise by defendant to send plaintiffs his crop, or in default, to allow them a commission on its amount, having no other consideration than the acceptance of a draft, for which a commission is already charged and allowed, is a *nudum pactum*, and will not be enforced.

This is an action on the following merchant's account against a cotton planter :

" Mr. R. G. WOOTEN.

To TAYLOR, GARDINER & Co.

Dr.

1840.

February. To your draft in favor of J. N. Cardozo,

due 10th May,..... \$191 22

" " commission, 2½ per cent. for accepting
same, 4 78

" " commission, 2½ per cent. for advancing, 4 78.

1841.

March. " interest, 405 days,..... 21 52

" " commission as per agreement 11th Fe-
bruary last, on 100 bales cotton, say
value \$3500, at 2½ per cent.,..... 87 50

" Amount due Taylor, Gardiner & Co. in cash
on the 1st April,..... \$309 80

" New Orleans, March 4th, 1841."

The agreement between plaintiffs and defendant is embodied in the opinion of the court. In this the latter agreed to send his crop to the plaintiffs, in consideration of the acceptance of the small draft contained in the account sued on. He failed to comply, and a commission of 2½ per cent. is charged on the supposed amount and value of his crop.

There was judgment for the amount of the account sued on, **WESTERN DIS. October, 1841.**
and the defendant appealed.

Copley, for the plaintiffs.

**TAYLOR
GARDINER & CO.
vs.
WOOTEN.**

McGuire, contra.

Martin, J. delivered the opinion of the court.

The defendant is appellant from a judgment, in which the plaintiffs recovered “\$191 22, the amount of a draft accepted and paid by them; also \$9 56, being 2½ per cent. for accepting, and 2½ per cent. for advancing on said draft; and the further sum of \$87 50, being 2½ per cent. commission on \$3500, the value of 100 bales of cotton.”

The defendant having occasion for the plaintiffs’ acceptance of a draft of his for a small amount, entered into the following agreement with them:

“*New Orleans, February 11, 1840.*

“In consequence of Taylor, Gardiner & Co. granting me an acceptance this day for \$191 22, at 90 days date, in favor of A. Cardozo, I hereby bind myself to ship to them my next crop of cotton, say 100 bales, and in default thereof, to pay them the commissions, that would accrue on said sales,”

“**R. G. WOOTEN.**”

The plaintiffs in their petition claim all the items which were allowed in the judgment; and the further sum of \$21 52 for interest.

It appears to us the court erred. The plaintiffs were entitled to the amount of the draft, and a commission of 2½ per cent. thereon, for their acceptance. The commission of 2½ per cent. for *advancing* was improperly allowed. There was *no consideration* for the allowance of a commission on the crop of cotton, which the defendant engaged to send to the plaintiffs for sale; as no cotton of the defendant was sold under the agreement. The promise to send them cotton, or in default to allow them their commissions, had no other consideration than the acceptance of the draft by them; and for this they have

Where a commission is charged for *accepting*, none can be claimed or a like commission charged for *advancing*, on the same sum or transaction.

WESTERN DIS.
October, 1841.

TAYLOR
GARDINER & CO.
vs.
WOOTEN.

A promise by defendant to send plaintiffs his crop, or in default, to allow them a commission on its amount, having no other consideration than the acceptance of a draft, for which a commission is already charged and allowed, is a *nudum pactum*, and will not be enforced.

charged, and the judgment allows them, a commission of 2½ per cent. The promise was therefore *nudum pactum*. In the case of Harrod et al. vs. Constance, 5 Martin, 575, we held, that neither law or custom allows the charge of a commission on a crop not sold by the merchant, but which he expected would be sent to him in consequence of advances made to the planter.

It is contended, that in the present case the commission is charged in consequence of the defendant's promise to pay it, if he did not send his cotton to the plaintiffs for sale; and as a compensation for a breach of his promise to send it. We have already said, that the promise being without consideration, cannot support an action.

As to the charge of interest in the account, the lower court has disallowed it, and the plaintiffs have not prayed the amendment of the judgment in this respect. See the case of Segond vs. Thomas, 10 La. Reports, 295.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed; and proceeding to give such judgment as in our opinion should have been rendered in the court below: It is ordered, adjudged and decreed, that the plaintiffs do recover from the defendant the sum of \$191 22, with 5 per cent. interest from the 6th of April, 1841, (La. Code, art. 1932,) until paid; and \$4 78 commissions for accepting draft; the plaintiffs and appellees paying the costs of the appeal.

ZOLLIKOFFER vs. BRIGGS, LACOSTE & CO.WESTERN DIS.
October, 1841.

APPEAL FROM THE COURT OF THE NINTH DISTRICT, FOR THE PARISH

OF CONCORDIA, THE JUDGE THEREOF PRESIDING.

ZOLLIKOFFER
vs.
BRIGGS,
LACOSTE & CO.

A slave held by a deed of trust or mortgage, which is not recorded in this State, to which the slave is removed, is liable to seizure by a creditor of the original owner.

Slaves held under a sale with the equity of redemption existing, are not liable to the seizure of a creditor of the original owner. He can seize only the equity of redemption.

This case commenced by injunction, The plaintiff alleges he is the owner of two slaves, named Sam and Eps, which he had conditionally sold in Mississippi, to A. & A. Clark, who failed to make payment, and he took them back and brought them to the Parish of Concordia, in Louisiana; and that he holds another slave named Manuel, under a deed of trust, from A. & A. Clark of Mississippi, which is also, with his other slaves in Concordia. He avers that the defendants have seized said slaves under a judgment they obtained against the Clarks, and as their property. He further alleges he has good and valid titles, and right to hold said slaves. He prays for injunction, and that they be decreed to belong to him.

The defendants pleaded the general issue, and prayed that the injunction be dissolved with damages, interest and costs.

Upon all the testimony adduced in support of the pretensions of the respective parties, there was judgment perpetuating the injunction, and confirming the plaintiff therein, in his title to the slaves. The defendants appealed.

Farrar, for the plaintiff.

Stacy, for the defendants and appellants.

Bullard, J. delivered the opinion of the court.

The plaintiff alleges that he is the owner of two slaves, *Sam* and *Eps*, having brought them to the State of Mississippi in September, 1836, with good and sufficient titles. That in Fe-

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October, 1841.

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 vs.
 BRIGGS,
 MACOSTE & CO.

bruary, 1837, he agreed to sell them conditionally, to Angus Clark and Archibald Clark. That at the time of delivering said slaves, the Clarks executed a written agreement by which they bound themselves to deliver to him an accepted draft on some good solvent commission merchant, for about \$3100, whereupon the petitioner was to make a good and valid bill of sale for said slaves, but in the failure to furnish the draft, the two slaves were to be delivered back to the petitioner. He alleges that the draft was never given, and no bill of sale ever executed. The petitioner further alleges, that on the 10th of January, 1839, the Clarks, at the request of the petitioner, delivered into his possession the said slaves *Eps* and *Sam*, and that he innocently and ignorantly destroyed the aforesaid written agreement, and in the hope and belief of confirming to himself the title to the aforesaid slaves, he obtained from the Clarks a bill of sale of the two slaves. That on the delivery of the slaves to him, on the 10th of January, 1839, he brought the slaves to the parish of Concordia, and put them upon a cotton plantation which he had rented. That afterwards he employed Angus Clark as overseer upon said plantation. He further represents that he has a lien or mortgage on a slave named Manuel, by virtue of a deed of trust executed in the State of Mississippi, on the 21st February, 1837, between Angus Clark, Archibald Clark and his wife, of the first part, John Stewart of the second part, as trustee, and the petitioner duly acknowledged before a justice of the peace and recorded in the office of the Probate Court. That the deed of trust was made to secure the payment of a promissory note for \$6450, dated February 21, 1837, and payable on the first of November following, to the petitioner, which note is yet in his possession, and a great part of it yet unpaid. That on the same 10th of January, 1839, the Clarks delivered to him the negro Manuel, and that he removed him to the parish of Concordia with the others, that they remained in his possession on the plantation rented by him, from the time of their removal until March, 1840. He further represents, that notwithstand-

ing the premises, the sheriff of the parish of Concordia had seized and taken into his possession the said slaves, by virtue of a writ of attachment at the suit of Briggs, Lacoste & Co., against Angus Clark, and also on an order of seizure and sale. He therefore prays an injunction, which was accordingly granted. The defendants deny these allegations, and pray the dissolution of the injunction to stay proceedings on their judgment against Clark, and for damages.

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ZOLLIKOFFER
vs.
BRIGGS,
LACOSTE & CO.

It appears that the defendants have a judgment which they recovered in the State of Mississippi, against Archibald and Angus Clark, and others, upon which they took out executory process here, and it was levied upon the three slaves in question. The only inquiry therefore is, whether Clark had such an interest in the slaves as could be seized in execution.

With respect to the slave *Manuel*, the plaintiff does not allege in his petition that he is the owner, but only that he has a lien or mortgage by deed of trust executed in Mississippi. It is not shown, nor even alleged that the evidence of this lien has ever been recorded in this State. Without such registry we have uniformly held, it cannot have effect in this State, against creditors. 8 Martin N. S. 222; 4 La. Rep. 42; 6 Idem 401.

A slave held by a deed of trust or mortgage which is not recorded in this State, to which the slave is removed, is liable to seizure by a creditor of the original owner.

The condition of the other two, *Eps* and *Sam*, is left rather equivocal by the evidence in the record. Archibald Clark was examined as a witness, and acknowledged that some of the slaves, at least which he had conveyed to Zollikoffer, were conveyed for the purpose of covering them from the pursuits of creditors, and particularly these defendants. The plaintiff alleges that he had sold those two slaves, but that not being paid for them, they were given back, and a written conveyance executed to him by the Clarks, and that deed is in the record, bearing date January 16, 1839. The evidence, and particularly the testimony of Archibald Clark shows that these two slaves in common with several more, were subject to be redeemed on the payment of the debt for which they were conveyed, about \$10,000; and that a considerable part has

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October, 1841.

BRIGGS,
LACOSTE & CO.
vs.
CAMPBELL.

been paid. It is certain they were employed by one of the Clarks in raising a crop, the proceeds of which went to redeem the slaves, and in that way between five and six thousand dollars were paid. It appears to us therefore, that Clark, the judgment debtor, had such an interest in these slaves as might be attached or seized by his creditors. The equity of redemption in the slaves is clearly a property belonging to Clark which his creditors might seize, although Zollikoffer could not be disturbed in his possession until the slaves were entirely redeemed by a repayment of the price.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court so far as it relates to the slave *Manuel*, be avoided and reversed and the injunction dissolved: and that as to the two slaves, *Eps* and *Sam*, the injunction be maintained, and the said slaves be restored to the plaintiff's possession, without prejudice to the right of the defendants to seize the equity of redemption in said slaves, belonging to Clark, and that the defendants pay the costs of this appeal.

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117 791

BRIGGS, LACOSTE & Co. vs. CAMPBELL.

APPEAL FROM THE COURT OF THE NINTH DISTRICT FOR THE PARISH OF
CONCORDIA, THE JUDGE THEREOF PRESIDING.

The certificate of the clerk of a court cannot be taken as proof of *the purport* of papers of record in his office, much less of such as are missing.

Remedial statutes have no extra-territorial operation.

The interpretation of contracts depends upon the foreign law; but the remedies by which the obligation resulting from contracts are sought to be enforced, must be according to the forms of the place where the remedy is sought.

This is an action on a judgment obtained in Mississippi against the defendant and others for \$1828 93, with 8 per cent. interest from the 17th May, 1838. This suit is by attachment against certain slaves, sent by Lewis Campbell to the parish of Concordia. The plaintiffs pray, that their judgment be made executory, and that the slaves attached be seized and sold, to satisfy their demand.

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BRIGGS,
LACOSTE & CO.
VS.
CAMPBELL.

The defendant pleaded the general issue and denied, that he was in any way liable for said judgment according to the laws of Mississippi. He set up certain matters as a special defence under said laws, and prayed the dismissal of the plaintiffs' suit.

There was a judgment dissolving the attachment; the district judge being of opinion, that the plaintiffs failed to make out their case. From this judgment they appealed.

Stacy, for the plaintiffs and appellants.

A. N. Ogden & McWhorter, for the defendant.

Bullard, J. delivered the opinion of the court.

This action, which was commenced by attachment, the defendant being a resident of the State of Mississippi, is founded upon a judgment recovered in that State against the defendant and others *in solido*.

The defendant pleads, that the pretended judgment was recovered under a statute of the State of Mississippi, passed in 1837, of which a certified copy is produced. That it appears, that said judgment was founded upon a promissory note drawn by Archibald Clark, and endorsed by this defendant and others. He alleges, that he endorsed the note as surety and for the accommodation of Clark, and that according to the laws of that State, and particularly the statute thus set forth, the plaintiff is not entitled to enforce said judgment against him, unless upon the affidavit of some credible person, made and filed among the papers in the cause, in the court in which the judgment was

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rendered, setting forth, that the principal in said note had no property in the State of Mississippi, out of which the money could be made; and he avers, that no such affidavit has ever been made. He further avers, that the plaintiff took out execution, and placed it in the hands of the sheriff, who levied on some property of Clark, sufficient to satisfy the judgment, by which levy the defendant avers, he is discharged from said judgment. He therefore prays to be dismissed, &c.

There was judgment for the defendant, and the plaintiffs have appealed. The plaintiff gave in evidence a record showing, that he had recovered the judgment sued on.

It appears by a bill of exceptions taken by the plaintiffs, that the court admitted in evidence, a document marked F., purporting to be an exemplification of a record in the high Court of Errors and Appeals for the State of Mississippi, notwithstanding the objection, that it appeared upon its face to be defective and incomplete, and to contain a transcript of only a part of the proceedings had in the suit, in Madison county, State of Mississippi, and the certificate of the clerk as to the substance of other proceedings, without proof of a loss of any part of the record. We think the court erred. A mutilated record is clearly inadmissible, and we cannot take the certificate of the clerk as proof of the purport of papers of record in his office, much less of such as may be missing. 1 Martin, N. S., 522; 18 La. Rep., 33.

The certificate of the clerk of a court cannot be taken as proof of the purport of papers of record in his office, much less of such as are missing.

It only remains to enquire, whether the plea of the defendant, that the plaintiffs cannot maintain this action on the ground that according to the laws of Mississippi, where the note was made and the original judgment rendered, the plaintiff was not authorized to enforce the judgment, recovered in that State, against him, unless upon affidavit, that the money could not be made out of the property of the principal obligor, was properly sustained.

The act of the legislature of the State of Mississippi entitled "an act to amend the laws respecting suits to be brought against endorsers of promissory notes," upon which the de-

defendant relies, is before us. The first and second sections direct the manner and plan in which actions against drawers and endorsers of bills of exchange and promissory notes shall be brought. The third section declares, that no plea but that of non-assumpsit shall be required upon the merits, and that all matters of defence may be given in evidence under said plea. The statute further provides, that duplicate writs shall issue to the several counties, where the various defendants may reside, and the names of the drawers and endorsers, particularly specifying the first, second and third endorsers, shall be endorsed upon the writs. The statute further makes it the duty of the sheriff, to make the money out of the drawer or drawers, acceptor or acceptors, and in no case shall a levy be made on the property of any security or endorser, unless on affidavit filed among the papers, setting forth, that the principals have no property in the State, out of which the plaintiff can make his money and costs.

These are all the provisions of the act, which it is necessary to recite, as having any relation to the present case. It is uncontested, that the extent of liability incurred by the defendant in endorsing the note upon which judgment has been rendered in Mississippi, and the construction of the contract entered into by him, are to be ascertained and determined by the *lex loci contractus*. But the statute relates altogether to the remedy which the creditor may pursue in the courts of that State; and with respect to remedial statutes, it is equally well settled, that they have no extra territorial operation. That the interpretation of contracts depends upon the foreign law, but the remedies by which the obligation resulting from contracts, are sought to be enforced, must be according to the forms and regulations of the place, where the remedy is sought, the *lex fori*. 11 Martin Rep., 730; 12 ditto, 475; 1 N. S., 203; Story's Conflict of Laws; 5 N. S., 585; 6 La. Rep., 676.

The court therefore erred, in our opinion, in sustaining the plea and giving judgment for the defendant.

It is therefore adjudged and decreed that the judgment of

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Remedial statutes have no extra territorial operation.

The interpretation of contracts depends upon the foreign law; but the remedies by which the obligation resulting from contracts, are sought to be enforced, must be according to the forms of the place, where the remedy is sought.

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 October, 1841. judgment as ought, in our opinion, to have been given below, it
 CRISWELL is considered by the court, that the plaintiffs recover of the de-
 vs. fendant \$1628 93, with interest at eight per cent. from the 17th
 SHAY ET AL. of May, 1838, and costs of both courts.

CRISWELL vs. SHAY ET AL.

APPEAL FROM THE COURT OF THE SEVENTH DISTRICT, FOR THE PARISH OF
 CATAHOULA, THE JUDGE OF THE FIFTH PRESIDING.

The capacity of the donor to give, in relation to donations *mortis causâ*, refer-
 ence must be had to the time of the donor's death, because it is not until then
 that the donation takes effect.

So where the husband, having then two children, makes a donation or disposi-
 tion *mortis causâ*, in his marriage contract of all the property of which he
 may die possessed, and which he may lawfully dispose of, to his intended
 wife, if she survives him; and his children die first, leaving no forced heirs,
 at his death *his wife becomes his universal donee*, and is entitled to his
 estate.

This is an action by the surviving wife to recover from the
 collateral heirs of her deceased husband, all the property of
 his estate and of which he died possessed. She claims to be
 his universal donee, in virtue of a disposition *mortis causâ*,
 made to her in the marriage contract in case she survived him
 of all his estate and which he might legally dispose. She
 shows that he died without any forced heirs, and that she is en-
 titled to his estate under their marriage contract.

The defendants claim as the heirs-at-law of the deceased,
 being nephews and neices. They also allege that the dona-
 tion is *contra bonos mores* and null.

There was a judgment for the plaintiff and defendants appealed. WESTERN DIS.
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Phelps, for the plaintiff and appellee, relied on the following articles of the La. Code, 2305 to 2316, 1730 to 1732, and 1736 to 1739.

2. The capacity of the donor to be tested by his situation at the time of his death; La. Code, 1745-46, 1489.

Hyams & Purois, for the defendant, insisted that the marriage contract although legal in its form, carried within it the seeds of its own reprobation and destruction. The donation was a nullity at the time it was made. It is expressly prohibited. Whatever is done contrary to a prohibitory law is null; La. Code, 11, 12, 19; *Idem*, 1745-6-7, 1743.

2. The capacity of the donor is to be governed by his condition at the making of the contract. Then he had children living, who were his forced heirs.

3. He could only give a fifth in usufruct; *Sirey*, 1098.

4. The donation is *contra bonos mores*; La. Code, 188; 17 La. Rep., 129.

Morphy, J. delivered the opinion of the court.

This is an action brought to obtain possession of the estate of the late Rezin Criswell, the plaintiff's husband, which was decreed by the Probate Court of Catahoula to belong to her as universal donee of the deceased. The answer admits that defendants were in possession of the property sequestered by the sheriff at the plaintiff's suit, and avers that they are entitled to it being the nearest collateral relations of the deceased, whose brother's children they are; it further alleges that the universal donation under which plaintiff sets up title to this property is *contra bonos mores*, prohibited by law and absolutely null and void. There was a judgment below for plaintiff, from which the defendants have taken this appeal.

As all the defendants were not parties to the decree of the Probate Court recognizing plaintiff as universal donee, and as

WESTERN DIS. those who did appear before that court acted in the capacity of
October, 1841. creditors in an application for the administration of the estate

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of the deceased, it is proper that we should pronounce on the issue placed before us without reference to the said decree.

The statement of facts shows that the plaintiff and Rezin Criswell were married on the 20th of August, 1840, that he died on the 20th of October following; that by his first marriage he had three children who survived their mother; that Isabella Criswell, one of them, died a short time before R. Criswell's last marriage with plaintiff; that the other two died after the second marriage but before their father; that Rezin Criswell left no ascendants or descendants; that the negroes found in the succession of Rezin Criswell (except Dan Johnson) named in the plaintiff's petition were the property of Rezin Criswell's first wife; that he inherited the same from his said children of the preceding marriage; and that all the remaining property found in his succession was acquired by Rezin Criswell after the death of his first wife and previous to his second marriage; that the marriage contract under which plaintiff claims as universal donee of R. Criswell, was executed on the day of her marriage with the deceased but before its celebration. Such are the material facts agreed upon by the parties; the clause in the marriage contract out of which this controversy grows, is in the following terms: "It is mutually agreed and stipulated by the parties that each gives, makes over and donates to the other, all the property of whatsoever kind and description, he or she may die possessed of, to go to the survivor of the marriage, and which may lawfully be given by act of donation, according to the laws of Louisiana; that is to say, the said Rezin Criswell gives, grants and donates to the said Mrs. Keturah Hollis (in the event of Mrs. Hollis being the survivor) all his property of every kind whatever, that he may die possessed of and which he is or may be entitled by law to dispose of *mortis causa*, and which portion will be determined by the number of heirs that he may leave at his decease. The

said Mrs. Hollis on her part gives, grants and donates to the said Regin Criswell, in the event of the said Criswell's being the survivor, all the property of every kind and description whatever, that she may die possessed of, under the same restrictions and reservations above specified."

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This clause of her marriage contract, under which plaintiff claims has been assailed on various grounds. It is urged that by article 1745 of the Louisiana Code, Regin Criswell, having two children of his first marriage alive, could donate to plaintiff only the lost child's portion and that only as an usufruct and that in no case could the portion of which she might have the usufruct exceed the fifth part of the donor's estate; that as at the date of this donation the deceased had no capacity to give nor the plaintiff any to receive more than that fifth in usufruct, the disposition is null and void, as made in contravention of a prohibitive statute. In donations *mortis causa*, the rule is well settled that in order to determine on the capacity to give or to receive, or on the validity of a disposition in relation to its amount, reference must be had to the time of the donor's death, because it is not until then that the donation is to take effect; La. Code, arts. 1455, 1459; 5 Toullier, No. 90: Having left no forced heirs, the universal donation made in favor of plaintiff is as valid as if it had been made in favor of a stranger; La. Code, 1739; had he left forced heirs, the donation would have been reducible, not void; *Idem*, 1491; 6 La. Rep., 367; 5 Toullier, No. 867. The restrictions imposed on the husband's liberality towards his second wife being entirely for the benefit of the children of the first marriage, none but them can complain; if they all die before the donor, the invalidity of the universal donation vanishes. Toullier in his commentary upon article 1098 of the Napoleon Code, which is nearly similar to ours, says, "The donation made to the second wife or husband will not be subject to reduction, if all the children of the preceding marriage should die a natural or civil death before the donor; for it is only at his death that the revocation can operate. The prohibition was made in favor

The capacity of the donor to give, in relation to donations *mortis causa*, reference must be had to the time of the donor's death, because it is not until then that the donation takes effect.

WESTERN DIS. of those children only; it ceases then if they do not exist at the time when the law would produce its effect and come to their aid;" 5 Idem, No. 878. It is said that a mutual and reciprocal donation by marriage contract being irrevocable, it must form an exception to the rule that in donations *mortis causa* the capacity to give must exist only at the death of the donor; this appears to us a *non sequitur*; the irrevocability of mutual donations *mortis causa* contained in marriage contracts is a feature which distinguishes them from similar dispositions made in a last will; the latter can be revoked and changed at any time before the donor's death, whilst the former cannot, but this circumstance does not change or alter in other respects the character of the donation which is nevertheless *causa mortis* and is to take effect only at the opening of the donor's succession. We are therefore of opinion that the children of Rezin Criswell having died before him leaving no other heir than their father, all their property became his, and was at his death as much his as any other property he then owned, and was included in the donation to plaintiff; 7 Martin, N. S., 665. From the terms of the donation it is evident that the deceased intended to give only what would lawfully belong to him at the time of his death and what the law permitted him to dispose of in favor of the donee; how then can it be said that the disposition is void as contrary to any prohibitory law. But it is further contended that the contract is in contravention of good morals and the policy of the law. That it makes the fortune of the second wife depend on the death of the children of her husband; that if they lived, the law made her poor, and if they died the contract made her rich; if considerations of this kind could have the weight and effect contended for by the appellants' counsel, every universal donation or legacy must be declared null; for in every case it will be the interest of the universal donee or legatee that every person from whom the donor or testator is to inherit property should die before him, in order that his estate may be thereby increased. There are a variety of situations in life which may excite in the bosom of

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the avaricious secret and criminal wishes and desires, but because a contract may be calculated to create such evil workings in the human breast, we do not feel ourselves authorized to declare it null as contrary to good morals, when it is not reprobated by law in express terms but on the contrary is sanctioned by its provisions; La. Code, 1736, 1737, 1738, 1739, 1045; 15 La. Rep., 562, and the authorities there quoted.

It is therefore ordered, that the judgment of the District Court be affirmed with costs.

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CONCORDIA, THE JUDGE THEREOF PRESIDING.

Evidence not pertinent to the issue may be admitted, and the effect of it be afterwards considered.

In a claim for right of ferry, evidence is admissible to show, the land purchased was not worth the price paid, without the right of ferry attached to it. The effect of it should be weighed with other circumstances.

Where the claim to a right of ferry depends on a condition, evidence should be received to show the condition has not been performed.

The certificate of the commandant, stating that a certain road was made, as required by the condition of a grant of the right of ferry, is not conclusive, but only *prima facie* evidence of the fact, which may be contradicted.

Evidence is admissible to show that a ferry, which is claimed under an exclusive grant from the Spanish government, was in fact kept under the control and supervision of the Police Jury.

Instruments, such as grants, certificates, &c., are admissible in evidence, without proof of the signatures. They are *prima facie* evidence; and may be contradicted by showing, that they were not acting in the capacity they purport.

The transfer of a grant or privilege may be proved by comparison of handwriting, when the signature of the witness is shown to be genuine, and he is dead.

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This suit commenced by injunction. The plaintiff alleges, that on the 19th February, 1801, the Marquis de Casa Calvo, then governor general of the province of Louisiana, granted to one Thomas Thompson, then a resident of Concordia, the perpetual privilege of keeping a ferry across the Mississippi river at the post of Concordia, as a privilege attached to his plantation; and on condition that he would clear and open a certain public road or highway from the post of Concordia to the bayou Crocodile, in the district of Concordia.

The plaintiff further alleges, that Thompson fully performed the condition of his grant by making said road, and enjoyed all the privileges and emoluments of said ferry until the 16th Oct., 1803, when he sold and transferred them to J. Vidal, for \$4000, when the whole would not have been worth \$800 without said ferry and the privileges thereto attached. That Vidal continued to own, possess and enjoy said ferry with its privileges and the plantation, until in the year 1817 they were sold and transferred to this petitioner, who has continued to own and possess them. He expressly alleges, that he has the exclusive right to keep a ferry across the Mississippi, according to the usages and laws of the Spanish government, for one league above and below the post of Concordia, which is also secured to him by the said grant to Thompson. He alleges, that the Police Jury of the parish of Concordia claim to exercise the right to sell or lease out said ferry in violation of his rights and grant; and that in April, 1839, they passed an ordinance to take possession, lease and sell out to the highest bidder all the privileges and rights to keep a public ferry at the place specified in his grant, and in violation thereof. He prays, that the Police Jury be enjoined from proceeding any further in said matter; that their ordinance be declared null, and that his interest in the same greatly exceeds \$300; he prays for general relief, and that his rights, privileges and grant to said ferry be confirmed to him.

The defendants admitted their proceedings to take possession and sell out the ferry in question, for the benefit of the parish.

They deny the exclusive right or privilege of the plaintiff to said ferry. That if any grant was ever made, it is inoperative and null, because its terms and conditions were never complied with by the grantee; and neither the plaintiff or grantee ever exercised the rights and privileges now claimed, or kept up a ferry, therefore, if they ever had any such rights or privileges, they are forfeited by *non-user*. They aver, their ordinance is legal and valid; that the Police Jury possess the right and authority to pass it and use said ferry for the benefit of the parish. They pray, that the injunction be dissolved with \$1000 damages, and that they be quieted in their rights and authority to lease out and sell the same for the parish of Concordia.

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Upon these pleadings and issues the case was tried.

The plaintiff founds his pretensions on the following documents:

"MR. COMMANDANT OF THE POST OF CONCORDIA.

"Thomas Thompson with due respect represents and sayeth: that as there are no more than 5 inhabitants now established here, we cannot incur the expenses of a road, unless the King pays us our work; and whereas his excellency the Governor has granted to Don Juan Heverard the ferry of Black River, for making a road at his *expense* from said river to the Bayou Cocodrillo: the petitioner proposes, that from the Post to Bayou Cocodrillo he will likewise make the road of 30 or 40 feet wide, at his expense, with the condition, that he may be granted to hold the ferry from his plantation to the landing of Natchez, as a privilege attached to his plantation; to which effect he promises to keep flats and other necessary boats to the purpose. This favor he expects to receive from you.

"THOMAS THOMPSON."

"Concordia, 27th January, 1801."

"HIS EXCELLENCY THE GOVERNOR.

"The proposition made by the petitioner is similar to that you were pleased to grant to Don Juan Heverard. The small number of inhabitants residing at this post, does not permit,

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that they employ themselves in an undertaking so costly, unless they be compensated, as I have exposed to your excellency on this subject: considering the advantages which will result, I recommend to your excellency to grant the prayer of the petitioner, who is a person capable of fulfilling what he proposes: Providing, it may please your excellency to grant the privilege which he solicits.

"JH. VIDAL."

"Concordia, 31st January, 1801."

"New Orleans, 19th February, 1801.

"Thomas Thompson conforming himself to make the road which he proposes, at his expense, under the inspection of the Commandant of the Post of Concordia, *I grant him* the privilege he prays for, to be attached to the plantation he possesses, in order that from that place, with the exclusive privilege, he may carry on the ferry of the river; demanding and receiving only the prices most equitable and customary which may be established by knowledge of said commandant.

"EL MARQUIS DE CASA CALVO."

"Whereas Thomas Thompson has complied with the conditions which he offered in his memorial; and that he has executed under my inspection what was prescribed to him by his excellency the governor in his anterior decree, I deliver these unto him, that he may make them valuable, and possess himself of the exclusive privilege granted to him of the ferry from this Post to the landing of Natchez.

"JH. VIDAL."

"Concordia, 16th February, 1802."

This privilege or grant, so far as it attached to the plantation, was transferred from Thompson, through Vidal himself, to the plaintiff.

On the trial the defendant's counsel offered a witness to prove, that Thomas Thompson never did cut out the road to the Bayou Crocodile from the Post of Concordia, as he proposed to do in his petition to the Marquis de Casa Calvo,

for the privilege of keeping a ferry from his plantation to Natchez, which testimony was objected to on the ground, that it contradicted the certificate of Vidal, the commandant, that he had done so; that the road had been cut by said Thompson as he proposed and was required to do. The court sustained the objections, and the defendant's counsel excepted to the opinion of the court.

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There was judgment for the defendants, dissolving the injunction, and that they recover \$400 from the plaintiff for the use of the parish; the plaintiff appealed.

Elgee & A. N. Ogden, for the plaintiff.

Stacy, for the defendants.

Garland, J. delivered the opinion of the court.

The plaintiff alleges, that he is the owner of an exclusive privilege or right of ferry across the Mississippi river, from the place known as the post of Concordia, in that parish, to the city of Natchez. That his exclusive privilege extends one league above and below the point or place named in his grant, which is the front of a tract of land of eight arpents on the river, granted to Thomas Thompson, to whom this exclusive privilege was also granted, as one annexed to the land, by the Governor General of Spain in the province of Louisiana. This grant, he says, was made on the condition, that Thompson should clear a public road or highway from the said Post of Concordia to the Bayou Crocodile, which condition he specially alleges has been performed.

He further states, that the Police Jury of the parish have passed an ordinance directing the parish treasurer to sell at public or private sale, the exclusive privilege of keeping a ferry for a certain length of time across the aforesaid river at the same place, where his (plaintiff's) ferry crosses, which will be a great injury to him; that said parish treasurer is about to proceed to make a sale of said privilege, and will do so, unless

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October, 1841. to arrest the execution of the ordinance.

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The defendants admit the passing the ordinance, say it was legal and valid, and avow their intention to have it executed unless prevented. They deny any exclusive privilege of keeping a ferry was ever granted by competent authority to Thompson, and if any ever was, they say it is null and void, because the terms and conditions have not been complied with or performed by the grantee or those holding under him; and that it has been forfeited by non-user. That by the interference of the plaintiff with their just rights, they have sustained heavy losses; they ask for a dissolution of the injunction and one thousand dollars damages.

The cause was tried by a jury; there was a "verdict for defendants with \$400 damages," on which the court rendered judgment, dissolving the injunction, and decreed the plaintiff to pay the four hundred dollars, from which he appealed.

The plaintiff produced as evidence the petition of Thomas Thompson, addressed to the Commandant of the Post of Concordia, representing the importance of having a road from that place to the Bayou Crocodile, and the inability of the inhabitants to make it, without their expenses being paid by the government; he therefore proposes to make a road thirty or forty feet in width, provided the privilege of a ferry from his plantation to the landing at Natchez is granted him, this privilege to be attached to the plantation. He promises, if the ferry is granted, to keep the necessary flats and boats to transport passengers, &c. The commandant Don José Vidal certifies to the governor, at the foot of the petition, the importance of the work, the inability of the inhabitants to perform it, the ability of Thompson to do what he promises, and recommends the propriety of the grant. These documents were presented to the Marquis de Casa Calvo, who on the 19th of February, 1801, says, that if the petitioner shall make the road he proposes, under the inspection of the commandant, he grants him the privilege he asks, to be attached to his plantation; that from

that place he shall have the exclusive privilege of a ferry across the river, demanding and receiving such tolls as shall be fixed by the commandant. It is proper to observe here, that the Marquis de Casa Calvo does not take upon himself any official capacity in this act, and the history of the province of Louisiana is silent as to his ever having been governor, unless he acted as such *ex officio* during the period between the death of governor Gayoso, which occurred in the summer of 1799, and the arrival of Salcedo, who was appointed military and political governor on the 21st of November, 1799; or in the absence of the latter on some occasion.

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On the 16th of February, 1802, Don José Vidal, the commandant, certified, that the condition specified in the memorial had been performed under his inspection, and that Thompson was vested with the exclusive privilege granted. On the 13th of September, 1803, Thompson conveys the tract of land, without saying anything about the ferry, to Don José Vidal, in consideration of the sum of \$4000 paid down, and on the 16th of October following he transfers in writing on the back of the paper purporting to grant, to the same person, all the right, title, claim and interest to the privilege granted, having, as he says, sold to him the plantation, to which the said right of ferry is annexed.

This tract of land, with the right of ferry attached, and another tract adjoining, Vidal in 1817 sold to the plaintiff, who has ever since kept up a ferry, but had the landing place on the adjoining or Vidal tract, as his immediate vendor seems also to have had.

A great deal of testimony was taken on both sides to show, Thompson had or had not used the grant, and that Vidal and Davis, his assignees, had never used it from the front of the Thompson tract, but from a point a quarter to a half mile above. Each party endeavored to exclude as much of the testimony of his opponent as possible, and both have so far succeeded as to bring the case before us in a very unsatisfactory manner, and.

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October, 1841. them, as it stands.

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On the trial the plaintiff, having proved, that there had always been a ferry kept by him and Vidal, on a tract of land belonging to them, adjoining to the Thompson tract, offered to prove the public convenience was promoted by the ferry being kept at that point, which evidence the judge refused to admit, and plaintiff excepted. We think the judge erred. The evidence ought to have been admitted, and the effect of it afterwards considered. We think the judge also erred in excluding the evidence offered by plaintiff, to show that the Thompson tract of land was not worth at the time it was sold \$4000, without the right of ferry. It ought to have been received, and the effect weighed with other circumstances.

We further think the judge erred, in excluding the evidence offered by defendants, to prove Thomas Thompson never did make the road from the river to the Bayou Crocodile, as stated in the certificate of the commandant. The making of that road was the consideration for the grant; the plaintiff in his petition tendered the defendants an issue on that point, in which they joined by a special denial. The plaintiff was permitted to show by the commandant's certificate the condition was performed, and the district judge was wrong in holding it to be conclusive. We think it only *prima facie* evidence, which the defendants may contradict. The commandant did not act in the matter in any judicial capacity, he was only a commissioner or superintendant, to see a particular work was executed; and no more sanctity is to be attached to his certificate, than to presume he did his duty, and told the truth; and thereby throw the burden of proving a negative on the other party.

We think the judge also erred in excluding the documents I, J, K and L offered by the defendants, to prove that, although the plaintiff had kept a ferry at the place he did, it was under the supervision and control of the Police Jury. The evidence was clearly admissible, to show an interruption or want of the prescriptive right set up by plaintiff.

The judge did not err in admitting in evidence the record books from the parish judge's office, to prove the recording of the acts therein contained, nor did he err in permitting a person, who on oath said he understood the Spanish language, to read and translate those records to him and the jury, they not understanding that language.

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We further think, the judge did not err in admitting in evidence the instrument purporting to be the petition of Thomas Thompson, and the recommendation by Vidal as commandant, and the grant signed by the Marquis de Casa Calvo, without proof of the signatures. They are *prima facie* evidence. That Vidal was the Commandant of the Post of Concordia at the time, is a matter of history; that Casa Calvo was about that time an officer of high authority in a military capacity, is also known; and it is possible he may have exercised some civil function, as was frequently the case under the Spanish government; but we do not believe he ever had a commission as Governor of the province of Louisiana. Salcedo, we have stated, was appointed military and political governor in November, 1799, and he continued to be such at the time Spain transferred the province to France, on the 30th of November, 1803, on which occasion he and Casa Calvo acted as the commissioners of the King of Spain, to deliver the country. Casa Calvo then was styled a brigadier in the King's armies, &c. 2 Vol. Land Laws, Appendix I, p. 165; Idem, p. 529. This evidence being *prima facie*, the defendants are at liberty to contradict it, and may show, that the Marquis de Casa Calvo was not governor or acting as such at the time of the grant. But until some sufficient evidence is given to the contrary, we will presume an authority existed. 12 Peters, 410.

We think the judge did not err in admitting the transfer of the privilege or grant by Thompson to Vidal, to be proved by comparison, after the signature of Minor, the subscribing witness, was proved, and it was shown he was dead. Had these facts not been shown, we think the comparison ought to have been made with more than one authentic or admitted signature.

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O. C. C., p. 306, art. 226; L. C., art. 2241; 2 M. R., 203;
9 L. R., 521; 11 L. R., 251; 1 N. S., 486.

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The judgment of the District Court is therefore annulled, avoided and reversed, the verdict of the jury set aside, and it is further ordered, that this case be remanded to the District Court, with directions to the judge to conform in the admission or rejection of testimony to the principles herein expressed, and otherwise to proceed according to law, the defendants and appellees paying the costs of this appeal.

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M'KOWN vs. MATHES.

APPEAL FROM THE COURT OF THE SEVENTH JUDICIAL DISTRICT FOR THE
PARISH OF OUACHITA, THE JUDGE OF THE FIFTH PRESIDING.

Where an appeal is not clearly suspensive, it will not be dismissed on the ground of insufficiency in the amount of the bond, when it covers costs.

The authority of a deputy clerk to issue an attachment, when denied, should be clearly established by evidence.

Where the admissions and declarations of the payee and endorser of a note, that he *transferred* it to the plaintiff, are *proved* by witnesses, it is sufficient to authorize a recovery, without actual proof of his signature.

Compensation and payment must be specially pleaded to enable the defendant to make proof of either.

But an amendment setting up the plea of payment and compensation, comes too late after the trial commences and the jury are sworn.

Where it is shown that the plaintiff sues as agent, or for the benefit of the payee of a note, the maker may set up every equitable defence he may have against the payee.

Where an attachment is dissolved, it is at the costs of the plaintiff, and the judgment should so state it, although the case is tried on the merits, by the appearance of the defendant, and judgment goes against him.

This suit commenced by attachment. The plaintiff sues on WESTERN DIS.
October, 1841. a note of the defendant, payable to one James Barr, or order, and by him endorsed, for \$93, and an account for work and labor done, in cutting timber, &c., amounting to \$543 50, which with the note, he annexes to his petition, and prays that a large cypress raft and some other timber be attached; that he have judgment for the amount of his entire claim, to be satisfied out of the proceeds of the property attached, as the property of the defendant.

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The defendant appeared, excepted to the attachment, that he was a resident of the State and not sued at his domicile, which he averred was in New Orleans.

On the merits, he pleaded the general issue; denied the plaintiff was the legal holder of the note, or that he ever gave any consideration for it; but that the suit was commenced for the purpose of harrassing and defrauding him. He prays judgment for \$1000 in damages, and that the plaintiff's demand be rejected.

Upon these issues and pleadings the case was tried.

There were various orders and proceedings had on the trial, and evidence produced by the parties which is detailed in the opinion of this court.

The cause was finally submitted to a jury who returned a verdict for the plaintiff of \$93, the amount of the note and costs; rejecting the account. After an unsuccessful effort by the defendant to obtain a new trial, he appealed from the judgment confirming the verdict.

McGuire, for the plaintiff.

Downs, for the defendant.

Garland J. delivered the opinion of the court.

The plaintiff claims of defendant the sum of \$93 with 6 per cent. interest, from the 2d March, 1840, due on a promissory note payable to and endorsed by James Barr, and a further sum of \$543 50, on an open account. He obtained an attach-

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ment on the ground the defendant was not a resident of the State, which was levied on a raft of cypress timber and a quantity of shingles, with which the defendant was descending the Ouachita River.

The defendant excepted to the jurisdiction of the court, alleging he is a resident of the city of New Orleans, of which place the plaintiff is also a resident, he therefore asks the dismissal of the suit, because it is not brought at the place of his domicil. He also asks to dissolve the attachment :

1. Because it is not true as is alleged, that he resides out of the State.

2. Because the affidavit is insufficient, defective and illegal.

3. Because there is and was no date to the writ of attachment.

4. Because the sheriff failed to make and return in due time a specific inventory of the property seized.

5. Because no sufficient service of the attachment was made.

6. Because the person who signs his name as deputy clerk of the District Court, to the order of attachment, was not at the time such deputy, and if he was, had no authority to make any such order.

7. Because the bond is illegal in form, insufficient in amount, and the security is insufficient.

8. Because it is not true the defendant is indebted as alleged.

On the trial of these exceptions, the inferior court dissolved the attachment, but overruled the plea to the jurisdiction.

The defendant then filed an answer to the merits, went to trial at a subsequent term of the court, and judgment was given against him for \$93, with interest from judicial demand and costs, which seem to amount to a large sum; from which defendant appealed.

The plaintiff and appellee moves to dismiss the appeal, on the ground the bond is insufficient in amount, as the appeal is suspensive. A reference to the petition of appeal and order

on it, settles the question. The defendant does not pray for a suspensive appeal, nor does the judge allow it, so far as his order goes. He says the appeal is granted on bond and security being given in the sum of \$160, conditioned as the law directs. The bond is given, with a condition that the defendant abide such judgment as shall be rendered against him. The plaintiff contends this condition makes the appeal suspensive. We think the character of the appeal can be better understood from the petition and order of the judge, and as that does not say it is suspensive, and the bond is only for \$160, we think it is a devolutive appeal. The motion to dismiss is therefore overruled.

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Where an appeal is not clearly suspensive, it will not be dismissed on the ground of insufficiency in the amount of the bond, when it covers costs.

From an attentive examination of the evidence given on the trial of the exception, and motion to dissolve the attachment for the causes stated, we are of opinion the judge did not err in overruling the exception to the jurisdiction of the court and dissolving the attachment. The evidence does not establish for the defendant a domicile in this State. It is proved, whilst in New Orleans, he resides at the house of a relation, for the purpose of disposing of the rafts of timber which he procures in the swamps or on the public domain in Arkansas. The witnesses have known defendant nearly or quite as much in Arkansas as in this State. He came originally from Kentucky, and sometimes spoke of that State as his home, as he frequently did of New Orleans. The impression the whole evidence makes on us is, the defendant has no domicile any where. He is one of that floating class of traders and adventurers who are so common in our cities and towns, and on the rivers in this State, who engage temporarily in such pursuits as present an immediate prospect of gain, and depart as soon as they find those pursuits unprofitable. In the case of *Williams vs. Henderson*; 18 La. Rep. 557; we had occasion to examine the question of domicile particularly, and according to the principles there laid down, the defendant has no domicile in New Orleans.

Of the numerous grounds, on which the motion to dissolve

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the attachment was based, it is only necessary to notice the sixth, it being sufficient to sustain the decision of the judge.

By that objection, the quality and capacity of the person granting the order of attachment and issuing it, is directly denied, and there is no evidence to show that Scarborough, who acted as deputy clerk was such. The process resorted to is one of much severity, and when ordered and issued by subordinate executive officers, should be closely scrutinized and their authority clearly established.

On the trial of the cause, the defendant, by his plea admitted his signature to the note sued on, but denied the plaintiff's right to it. He further alleged the note was not in plaintiff's possession when the suit was commenced, but had been since put into his hands without consideration or endorsement, for the purpose of harrassing him. The note is payable to James Barr or order, and purports to be endorsed by him. In the course of the trial of the exceptions, Barr came to the stand as a witness, and stated on his *voir dire* he was interested and was not examined. The plaintiff, for the purpose of establishing his title to the note, offered to prove by Pagan and other witnesses, that Barr, the payee, had on different occasions admitted he had endorsed the note to plaintiff. To one witness, he said, he still had an interest in the note, although he had transferred it; to another he said, plaintiff and he had been in partnership, and the note had fallen to the share of the former, and he (plaintiff) was the owner of it. To a third, he said, he had traded the note to plaintiff who had paid him for it. Did not say he had *endorsed* it, but said he had *transferred* it.

The defendant objected to the introduction of this as evidence, on the ground: 1st. It was hearsay. 2d. The admissions of the payee of a note not a party to the suit, are not evidence of transfer or endorsement. 3d. It is not a mode recognized by law to prove signatures. 4th. Because the payee is interested in the event of this suit. The District judge overruled the objections and admitted the testimony.

We are not prepared to say the judge erred. The admissions of Barr do not come within the definition of what is properly called hearsay evidence. That the admissions of the payee and endorser, that he had transferred the note, ought to be admitted, is a question of more doubt, but we cannot say, they should in this case have been excluded. The defendant had admitted his signature to the note. The plaintiff had possession of it, which is *prima facie* evidence of title and to recover, it was only necessary to show the payee had been divested of the legal interest. The admissions of Barr did not make the obligation of the defendant more onerous. If he had had equities against the note, he could have opposed them to the plaintiff, as the note was transferred after it was due; and as the object of proving a transfer, was to enable the plaintiff to recover and protect the defendant from any claim of Barr hereafter; his admissions will bind him in any future claim he may allege. If the witness, instead of saying that Barr had admitted he had transferred the note, had stated they had seen him write, and believed the endorsement on the note was in his hand-writing, there is no doubt it would have been sufficient, and there is but little difference in proving that he acknowledged the transfer. As a general rule, the admission of a signature only binds the party who makes the confession, but when the obligation of another party is not affected by it, we see no sufficient reason why it should be rejected. Evidence of this kind is however of the weakest character; 9 La. Rep. 562; 10 Idem, 528; 11 Idem, 139. This view of the point seems to include the other two objections made by defendant.

On the trial, the defendant's counsel offered evidence to prove the defendant had loaned the plaintiff money, furnished him with provisions and tools, made him payments and advances, that plaintiff had taken shingles and timber belonging to defendant, which he had not paid for. To this evidence the plaintiff's counsel objected, on the ground that there was no plea of compensation or payment in the answer, and no such

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Where the admissions and declarations of the payee and endorser of a note, that he transferred it to the plaintiff, are proved by witnesses, it is sufficient to authorize a recovery, without actual proof of his signature.

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Compensation and payment must be specially pleaded to enable the defendant to make proof of either.

But an amendment setting up the plea of payment and compensation, comes too late after the trial commences and the jury are sworn.

evidence could be admitted under the general denial, and the mere allegations that defendant did not owe plaintiff any sum.

We think the judge did not err in sustaining the objections.

Compensation and payment must be pleaded, to enable a defendant to make proof of either. Those pleas imply the existence of a demand, and if a party wishes to have the benefit of them he must also incur the responsibilities they impose.

After the court rejected the evidence, the defendant moved to amend his answer so as specially to set forth these payments and advances, on the ground that the justice of the case required it, and that such amendments ought to be allowed at any stage of the cause. The plaintiff objected to this, and was sustained by the court, to which the defendant also excepted. We do not think the judge erred. The issues had been made up between the parties. The plaintiff had no notice given that payment or compensation would be opposed to him, he only came prepared to prove his demand and could not be supposed, ready to go into an examination of the claims attempted to be proved. The jury had been sworn, the cause was on trial, and a considerable portion of the evidence heard when this motion was made. We think it came too late. The pleas should have been filed before, and the plaintiff thereby notified of them.

The defendant then moved the court to charge the jury, that if they should be of opinion the plaintiff was not the real owner of the note sued on, but that it really belonged to Barr and was put into the hands of plaintiff, only to enable him to obtain an attachment, then they should find for the defendant. This the judge refused, and told the jury if they found the plaintiff was the agent or holder for collection, of the note sued on, the action could be maintained and an attachment could be sued out. To this, defendant excepted. The judge was, we think, correct in his charge to the jury. The authorities that an agent may sue on a note payable to order, and endorsed in blank, are numerous; but defendant may set up all his defence against the payee in such a case as the plaintiff

is only agent, and stands in the place of the payee; 3 Martin N. S. 291, 392; 3 La. Rep. 431; 4 Idem 220, 533; 13 Idem 13.

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It was also proved on the trial, that when the deputy sheriff went to attach the timber of defendant, he told him he did not owe the plaintiff any thing except the note sued on. There is a great deal of contradictory evidence in the case, the jury gave a verdict for the amount of the note and interest, rejecting the account set forth in the petition. We are not disposed to disturb the verdict and judgment thereon, as we think the jury has done substantial justice between the parties.

In examining the judgment as given by the court below, there is error in taxing the defendant with the costs of attachment, which was dissolved as we think, correctly. For all the costs relating to the issuing the attachment, and consequences of that writ, the plaintiff is responsible, it being a process distinct from the citation, and other costs incurred in the case, and the District Judge in his order dissolving the attachment should have stated it was at the costs of the plaintiff.

Where an attachment is dissolved, it is at the costs of the plaintiff, and the judgment should so state it; although the case is tried on the merits, by the appearance of the defendant, and judgment goes against him.

The judgment of the District Court is therefore affirmed in all respects, except as to the costs arising from the issuing an execution of the writ of attachment, including those costs incurred for keeping and preserving the property seized, which are to be paid by the plaintiff and appellee, together with the costs of this appeal.

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STATE vs. COTTON.

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APPEAL FROM THE COURT OF THE SEVENTH DISTRICT, FOR THE PARISH OF
OUACHITA, THE JUDGE OF THE FIFTH PRESIDING.

On the failure of the accused to appear when called on the second day of the term, a judgment *ni si* only is to be entered, which may be *set aside* during the same term, on the appearance of the party accused.

So where a party accused and his sureties failed to appear on the second day of the term and a judgment was entered up against them; and afterwards, but during the term, the principal surrendered himself: *Held*, that the judgment should have been *set aside* on his appearance in court.

This is an appeal from a judgment on a recognizance or bail bond.

The defendant being committed on a criminal charge gave bail for his appearance at court at the April term, 1841, for the parish of Ouachita. The grand jury found a bill of an indictment for rape, and on calling out the defendant on his recognizance he failed to appear, and judgment of forfeiture was entered on the minutes in the sum of \$2000, the amount of his bond. A bench warrant issued, the defendant brought in, formally arraigned, and on the part of the State, the case was continued until the next term. The defendant gave bail for his appearance accordingly.

A motion was made by the defendant's counsel to set aside the judgment of forfeiture, which was opposed by the District Attorney and the motion refused by the court. The defendant appealed.

McGuire, District Attorney, on the part of the State.

Garrett & Downs, for the defendant.

Garland, J. delivered the opinion of the court.

The defendant being charged with a criminal offence entered into a bond for the sum of \$2000, with two securities in the sum of \$1000 each, the condition of which was, he should appear before the District Court of the parish of Ouachita, at the

April term, 1841, to answer to the offence with which he was charged. An indictment was found by the Grand Jury, the defendant then being in attendance; a short time after which, he wishing to return home, as he says to prepare for his trial spoke to the deputy clerk and another person of his intentions and asked their advice. By these persons he was informed that he could not be tried until three days after service of a copy of the indictment, and *venire* had been served on him. He then requested those persons to inform his counsel if he should be wanted, that he had gone home and should return on the third day afterwards with his witnesses. The next day, the District Attorney called for the defendant to arraign him, and he not appearing, his securities were called upon to produce him, which they failing to do instantler, the District Attorney moved the court to enter up a judgment forthwith for the amount of the bond, to wit: \$2000 against the principal, and \$1000 against each of the securities, which judgment the court gave immediately. A bench warrant was issued and the sheriff went to arrest the defendant, who was from home when the sheriff arrived at his house, but hearing that the officer was in pursuit of him, he came immediately, surrendered himself and accompanied the deputy sheriff to the court-house, where they arrived before there could in the ordinary course of business have been a trial, if the defendant had not gone away. The deputy sheriff says the defendant made no effort to escape, which he might easily have done if he had wished. As soon as the defendant arrived his securities surrendered him, and they were subsequently discharged from all liability. The defendant also showed cause and endeavored to get the judgment *ni si* set aside as to him, which the judge refused and made it final, from which he appealed.

This proceeding took place under the first section of the act of 1837, p. 98, relative to the recovery of bonds and recognizances in criminal cases. This act authorizes the District Attorney to call on a party accused of any offence, (who has given bond,) at any time on or after the second day of the

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On the failure of the accused to appear when called on the second day of term, a judgment *ni si* only is to be entered, which may be set aside during the same term, on the appearance of the party accused.

So where a party accused and his sureties failed to appear on the second day of the term, and a judgment was entered up against them; and afterwards, but during the term the principal surrendered himself: *Held*, that the judgment should have been set aside, on his appearance in court.

term, to appear, and if he do not, and if the securities when called fail to surrender him, then the District Attorney may on motion have a judgment entered against both principal and sureties *in solidum* for the full amount of the bond. Which judgment may, during the same term of the court, be set aside upon the appearance, trial and acquittal, or conviction and punishment of the party accused, or if it is proved the party is prevented from attending by some existing physical debility.

In a very little time after the defendant returned to the court-house and was surrendered by his sureties, he was arraigned, his case was continued on his application to procure witnesses, and he gave bond and security *in solido* for four thousand dollars to secure his appearance at the succeeding term of the court. Notwithstanding all this, the district judge made the judgment *ni si* final, because the defendant was not tried at that term of the court.

We think the judge has given a too literal and rigid interpretation to the law. Its object was to secure attendance at court, of the persons accused of offences, to answer the accusations preferred against them, and should be executed in a way that will attain that object, and not to punish parties in advance. Suppose in this case, the State had not been ready for trial, and the District Attorney had applied for a continuance, according to the literal application given to the law, the defendant would have been still obliged to pay his bond, which would have been unjust. He would certainly be entitled to a release upon the ground that the prosecution was not under his control, but that of the laws of the country, and he could not prepare the cause for trial in behalf of the State. Now we are to presume, he showed sufficient cause in the District Court to entitle him to the continuance that was granted, whereby the requisites of the law were fulfilled and public justice satisfied. A citizen ought not in a criminal prosecution, without some fault on his part, be put in such a situation, that he must incur a heavy pecuniary loss, or go to trial under circumstances that would almost if not completely insure his conviction.

Nearly every case has its circumstances of mitigation or aggravation, which should have their due weight in forming an opinion in relation to it. In this, we cannot see any intention to avoid a trial or to escape, on the contrary, the defendant although badly advised, seems to have been desirous of preparing for trial, and was possibly prevented from getting ready by being arrested when he was in search of his witnesses.

The judgment of the District Court is therefore annulled, avoided and reversed, and a judgment given for the defendant.

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JONES vs. YOUNG.

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RAPIDES, THE JUDGE THEREOF PRESIDING.

Parties are not to be controlled in the order in which they adduce their proofs on the trial: so in the transfer of a note, the defendant may examine witnesses to prove the existence of equities between the original parties affecting the consideration, and afterwards show, that the plaintiff took the note with a knowledge of their existence.

Where the plaintiff took defendant's note endorsed in blank by the payee and before due, but with a knowledge of the equities existing between the original parties, amounting to a failure of consideration, he cannot recover.

This is an action on a promissory note, signed by the defendant the 3d February, 1836, for \$1655 95, payable to the order of Stephen Tippet, and by him and others endorsed. On the 11th April, 1837, the note was transferred to the plaintiff and before it was due, by the Tippetts, subrogating him to all their rights against the maker.

The defendant pleaded the general issue; and averred, that the note was given with others for the price of a piece of land,

WESTERN DIS. from which he had been evicted by a pre-existing mortgage of
October, 1841. P. B. Martin, and of which the plaintiff had knowledge before

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receiving said notes. That he has a right to offer in his defence all the equities existing between the original parties, which is a failure of consideration; and that the land for which the notes were given, was sold in the spring of 1838, to pay P. B. Martin's mortgage.

The whole matter, with the evidence in support of the defence, was submitted to a jury; the most material parts of which are recapitulated in the opinion of this court.

There was a verdict and judgment for the defendant, from which the plaintiff appealed.

Dunbar & Hyams, for the plaintiff.

Elgee, for the defendant.

Bullard, J. delivered the opinion of the court.

This is an action by the endorsee of a promissory note against the maker. The defendant pleads, that the note was given with others in part consideration of a tract of land, which he purchased of Stephen Tippet and others. That he has since been evicted of the land for which the note was given, and that the consideration has failed. That these facts were within the knowledge of the plaintiff, and he took them subject to all legal exceptions against the payee. That the transfer of the note by the payee was in fraud of his rights. That it was agreed and understood, that the note when given was to be immediately transferred to P. B. Martin, who held a prior mortgage on the land, so as to extinguish the mortgage to that extent, and give the respondent a clear title. That the note was transferred in violation of this agreement, well known to all the parties and especially to the plaintiff, and that the land has since been seized and sold under the mortgage of Martin.

The case was tried by a jury, who found a verdict for the defendant, and the plaintiff appealed from the judgment rendered thereon.

It appears from a bill of exceptions in the record, that the plaintiff's counsel, during the trial excepted too much of the testimony of Holt & Beaman, as related to any conversations between them and the defendant Young, or between them and Tippet, relative to the note sued on, unless such conversations were had in presence of plaintiff, or were communicated to him previously to the transfer of the note, and he particularly objected to evidence of any conversation between the witnesses and Tippet or Young, as to any application of the notes given by Young to the mortgage notes given by Tippet to Martin, unless such conversations were in presence of the plaintiff or communicated to him before he became the holder of the note. But the court admitted the testimony as set forth in the note of evidence, on the ground that the defendant might bring home knowledge of it to the plaintiff afterwards in the progress of the trial; and if so, then the evidence was good, otherwise not.

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We are of opinion, the court did not err. It is well settled under our practice, that parties are not to be controlled in the order, in which their proofs are to be laid before the court or jury. In the present case, if the defendant failed during the trial to bring home to the plaintiff's knowledge of the equitable circumstances, before he became holder of the note, the court might have been moved to instruct the jury, that the evidence of these statements out of his presence was not legal evidence against the plaintiff.

Parties are not to be controlled in the order in which they adduce their proofs on the trial: so in the transfer of a note, the defendant may examine witnesses to prove the existence of equities between the original parties affecting the consideration, and afterwards show that the plaintiff took the note with a knowledge of their existence.

Upon the merits, it was shown upon the trial, that the note was given for an instalment of the price of a tract of land bought by the defendant of Tippet, of which he has been evicted in consequence of a previous mortgage in favor of Martin. Holt, sworn as a witness, testified, that Tippet told him he had agreed with Young, to whom he had sold a part of the land, that his notes should be transferred to Martin, to make the debt lighter or to extinguish so much of it. Tippet told him, that was his object in selling the land to Young. That was understood before the sale, and that Martin was to

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take the note. The witness further testified, that in 1836 he was riding with Jones, the plaintiff, down the river, and they began to speak about the same land, and witness remarked, that he thought Tippet had acted foolishly in selling this piece of the land to Young, as he considered it the best part of the tract. Jones replied, that *Tippet had done so to make his payments to Martin easier*. Don't remember, that anything was said about the notes. That Jones and Tippet were very intimate; they had cultivated the plantation together the year before. That Tippet was a talkative and communicative man and spoke of his matters to every body, except when he was about to go to Texas. Mr. Beaman testified, that a day or two after P. B. Martin sold his property, Jones, the plaintiff, called on him to join him (Jones) in going security for Tippet to Martin for about \$3000, which witness agreed to do. Jones told him, that Tippet was to place Young's notes, of which this is one, in their hands as collateral security. A day or two afterwards witness was called upon to endorse the notes for Tippet to Martin, and witness then made the remark to Jones, that he had had a conversation with Young about those notes, and that if Tippet should pay for the land he had bought of Martin, then there would be no difficulty in Young paying his notes; but if Tippet did not, there would be a difficulty in collecting the money from Young. Jones replied, that the notes given by Tippet were well secured, and that there was no danger of their not being paid. Witness further says, that he would not under those circumstances have taken Young's notes and given value for them. It is further shown, that one of the payees objected to the transfer of the note, but that she was finally persuaded to sign the act by her son, S. Tippet, and that Jones was present.

Where the plaintiff took defendant's note endorsed in blank by the payee and before due, but with a knowledge of the equities existing between the original parties, amounting to a failure of consideration, he cannot recover.

The jury concluded from the evidence adduced on the trial, that the plaintiff could not recover, on the ground, that he was informed of the equitable defence of the defendant. We do not regard this as one of the cases, in which it is our duty to disregard its verdict. The jury knew the parties and the wit-

nesses, and could better judge of the weight of evidence, than we can be. They concluded from the intimacy of the plaintiff with his transferor, and the conversations between him and Holt & Beaman, that he took the note at his peril, and that Tippet had violated his agreement to transfer the note to Martin in discharge of the mortgage.

The judgment of the District Court is therefore affirmed with costs.

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ROWLEY vs. ROWLEY.

APPEAL FROM THE COURT OF THE NINTH DISTRICT, FOR THE PARISH
OF CONCORDIA, THE JUDGE THEREOF PRESIDING.

This court will take jurisdiction of a suit for separation from bed and board, although the matter in contestation is not *appreciable in money*, or does not consist in a money demand exceeding 300 dollars.

The law expressly gives the courts jurisdiction in cases of separation from bed and board, and in actions of divorce; and this court will not hesitate to act under it, when they have not the slightest doubt of the constitutionality of the law.

Upon affidavit made, and in consideration of its being the first term, a continuance should be allowed; but if on appeal it appears, that by the admissions of the adverse party, &c., no injury is sustained by going to trial, the case will not be remanded on this account.

Living unhappily together; having frequent differences, ebullitions and displays of temper, but without any personal or other violence; the want of supplies or necessaries according to the wife's demands; the non-payment of her bills promptly, and education of her daughter; the want of support according to her rank and fortune she brought to the marriage, and supposed impossibility of the parties ever living together again, are not sufficient *cause of separation from bed and board*.

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VS.
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Where a woman has her domicile here, and marries in another State, it does not prevent a community of acquests and gains from existing, when the parties afterwards remove to Louisiana.

In a judicial sale for a partition among several heirs, the husband of one of them may purchase the entire property sold, which becomes community property from that time; he being responsible to the wife for the price only.

Where, in a purchase by the husband, the portion of the wife in the estate sold is imputed to the extinguishment of the price to be paid by him, he is bound to her for it, with a legal mortgage to secure it, if he administers her paraphernal estate.

If the wife have a fortune, and is in the administration of it, and the husband little or none, she is bound to pay or contribute at least half of the matrimonial charges.

The wife is not entitled to interest on recovering her paraphernal property, when the husband administers it, or when it is administered indifferently by the husband and wife; as the fruits of paraphernal property, except the young of slaves belong to the community.

During the pendency of a suit of the wife for a separation from bed and board, the wife may leave the home assigned as her residence, on business, and be temporarily absent.

A judgment for alimony may be given, even when no separation from bed and board follows.

The court may, in its discretion, change the residence of the wife during the pendency of her suit for separation.

This is an action by the wife against the husband for a separation from bed and board, and also for a separation and partition of property.

The plaintiff alleges, that in the spring of 1834, being on a visit to the city of Troy, in New York, where her daughter by a former marriage was then at school, she intermarried with Charles N. Rowley, of that State, and in the latter part of the year she returned with her husband to Louisiana, where they have both ever since resided.

The petitioner shows, that at the time of marriage with the defendant, she owned and possessed an undivided third part of a large plantation and slaves, formerly the property of her ancestor, situated in the parish of Concordia, and then owned and held in partnership between her and her sister, Mrs. Sprague,

and James Kemp, her brother; her interest and share therein being \$47,000; that in June, 1835, the Marengo plantation and slaves were sold to effect a partition between her and her co-proprietors, and adjudicated to the defendant, who became possessed of this large estate, from which he has ever since derived large yearly revenues.

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She further shows, that her marriage with the defendant has been destructive of her own happiness and peace of mind, and deeply injurious to the interests and future prospects of her only child of her former marriage; that ever since her said marriage, her husband has pursued towards her a course of injustice and oppression, evincing a total disregard of her feelings and rights, and has been guilty of repeated acts of cruel treatment and outrage to her feelings, of such a nature and degree as to render their living together *insupportable*; that she has acted towards her husband as a faithful and dutiful wife, but has suffered for years past under the deepest distress of mind, inflicted on her by his unjust and unnatural conduct. Finding that her living any longer with her said husband would be altogether insupportable, on the 15th December last (1840) she left his domicil, with her daughter, and is now impelled to seek relief from this court.

She further shows, that when she intermarried with the defendant, she was in affluent circumstances, and he was without means; and she placed him in possession of all her fortune and property; that he has made large revenues therefrom, but has refused to her the common necessities of life, or even the smallest sums of money for herself and daughter. She alleges and sets forth various other acts of her husband tending to her injury and degradation, and that of her daughter as additional causes of separation.

She prays for leave to institute this suit; that she have judgment of separation from bed and board; and as she is without an income, that a domicil be assigned her, with an allowance of \$200 per month, during the pendency of this suit; and finally, that she be decreed separated in property, and have the

WESTERN DR. possession and administration of her separate estate restored to her, with one half of the acquests and gains, and that a final partition and division be made.

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The petition was sworn to, and the petitioner authorized by the judge to institute and prosecute this suit; her domicile fixed at the house of M. Debruys, in the parish of St. James, with a monthly allowance of \$200, to be paid by the defendant, during the pendency of the suit.

The defendant pleaded a general and special denial of every allegation and charge in the petition, except such as were expressly admitted or modified. He regrets, that the daughter is brought into this controversy and avers he has always treated her with the greatest regard and respect, and bears willing testimony to her amiable and affectionate disposition and engaging manners. He denies having ill-treated, or being guilty of any cruelty and oppression towards the plaintiff; that since his marriage his life has been much embittered, and his peace of mind destroyed by the frequent paroxysms of her ungovernable passions, which arising from the slightest possible causes, or from no cause whatever, for a time deprive her almost of her reason: such has been her state of mind during her present and former marriage, from her peculiar cast of mind and temper, that he attributes to it the cause of all the disagreements and difficulties with both her husbands. He admits, that her general demeanor and conduct towards him have been that of a kind and affectionate wife; and so long as her mind remained calm, her conduct was praiseworthy; that he has forbore, and by gentleness endeavored to sooth her when angry and excited. He expressly avers, he has always strove to provide the plaintiff and her daughter with the conveniences and comforts of life suitable to their condition and his pecuniary means, and that her complaints are unfounded in this respect. He admits she was a frugal and industrious wife, often laboring with her hands and needle in making his clothes, and performing the duties of the household; but it was all her voluntary act.

The defendant admits, that on the 15th June, 1836, he be-

came the purchaser of the Marengo plantation and slaves for \$137,500, which had been previously owned by the plaintiff and her two co-proprietors, as she has alleged; that by said purchase he became the owner of said property and its increase, and bound for the price; that there exists a community of acquests and gains. He avers, he has devoted his best energies to improve and increase the community of property; appropriating nothing to his own exclusive use or advancement of his private interests. In conclusion he denies ever pursuing towards his wife a system of oppression and cruelty, or that he has ever been regardless of her feelings, and treated with indignity; and he has given her no justifiable cause either to abandon his domicile or institute this action. He prays, that the suit be dismissed; the plaintiff's demand rejected as unjust and unfounded, and in case of separation, that he be decreed to be the owner of the Marengo plantation and slaves, with their increase and all the other property thereon; that the community be settled and divided among them.

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Upon these issues and pleadings the cause was tried. There was a mass of testimony taken on both sides, in support of the respective allegations and averments of the parties, which comes up in the record, and is too voluminous to be detailed. It is fully stated in the opinion of this court.

There was judgment for the plaintiff, decreeing a separation from bed and board; and of property, goods and effects of every kind; also for \$4,306; that she be put in possession of one-third of the Marengo plantation and slaves, with their increase, as she owned them previous to her marriage; and also that she recover one half of the acquests and gains made during marriage, and a partition made of all the property; the defendant to pay the costs of suit; the costs of partition to be borne equally by the parties. The defendant appealed.

A. N. Ogden & Dunbar, for plaintiff, argued at much length. They contended, that the grievances and outrages towards the wife and her daughter, as set out in the petition, were fully

WESTERN DIS. sustained by the evidence, and were good grounds for a separation from bed and board; and in this respect the judgment of the inferior court must be affirmed.

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2. The answer refers to plaintiff's conduct towards her first husband. The evidence fully establishes the fact, that he treated her cruelly; was intemperate, and his conduct very bad. This fully accounts for her deportment as detailed by the witnesses. Violence towards the wife is not necessary to be proven. If excesses and brutal treatment of her is shown, which renders their living together insupportable, it is sufficient to authorize a separation; 9 Martin, 452; 2 Toullier, No. 764; 2 Duranton, Nos. 531, 552, 553.

3. It is shown, that the defendant after he became possessed of all his wife's means and fortune, and in the possession of large property, was exceedingly parsimonious towards her and her daughter; denying the means of a comfortable and decent support; often even the necessities of life were denied her.

4. The plaintiff's counsel further contend, that the Supreme Court has no jurisdiction of a question of divorce itself, because it is not a money demand: but it has of the question of a separation of property and the restoration of the paraphernal estate. 3 Martin, 44.

5. The appellate court may entertain jurisdiction of part of a case, and not of the remainder. 4 Wash. C. C. Rep., 492. As to the paraphernal property, the plaintiff is entitled to recover one-third of the Marengo estate in kind, because the husband could not purchase the interest of his wife therein. The husband cannot purchase from the wife. La. Code, art. 2421; 13 La. Rep., 173; 14 Idem, 115; 12 Toullier, Nos. 155-6.

Stacy & Gen. Huston, for the defendant and appellant, insisted, that the allegations in the petition were vague and insufficient to establish the plaintiff's case. Those relative to cruel, oppressive and other bad treatment are vague and general, and refer to no particular acts or conduct of the hus-

board. The only real and definite allegation is the one in relation to the want of necessities and the comforts of life, and that they were not furnished or allowed. If this were the fact, she had her remedy without a resort to this action. The evidence does not sustain the allegations as to oppressive and cruel treatment, and furnishes no ground for separation.

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2. It is shown, the plaintiff had an allowance of \$600 a year for clothing of herself and daughter, besides market money, amounting to from \$4 to \$10 per week. Other advances and allowances were made; and plaintiff's own testimony shows, she was amply supplied with necessities, &c.

3. The defendant by purchasing the Marengo estate, made it community property; he was also responsible to the wife for her share of the price. The sale was made to effect a partition among co-proprietors, of whom his wife was one, and he had a right to purchase. The Marengo estate then became community property, with all the increase and young of slaves. 18 La. Rep., 351; 12 Idem, 107; La. Code, 2341, 2420 and 1784.

4. The plaintiff has failed to make out her case for a separation according to law; the opinions of her witnesses are not to be taken, but facts. La. Code, 139. All she can claim is the possession and administration of her paraphernal property; and this without recovering any interest on the amount.

Garland, J. delivered the opinion of the court.

This action is instituted for a separation from bed and board; a recovery of the paraphernal property of the wife, a dissolution and settlement of the community of acquets and gains and partition of the same.

The petition states the parties were married in the State of New York in the month of April, 1834, the plaintiff being a resident of the State of Louisiana, and the defendant then a resident of the former State. That in the autumn of that year

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the plaintiff returned with her husband, and they settled in the parish of Concordia, which was the domicile of the wife previous to and at the time of her marriage, where she owned a considerable property in land and slaves. The petition goes into a long detail in relation to the property she owned at the time of the marriage, the fact of being previously married and having a daughter, all of which circumstances and allegations will be hereafter noticed in connection with the decision upon the law and evidence of the case. She further alleges that with a view to the promotion of the happiness of herself and daughter, she married the defendant relying on his professions of attachment, but all her hopes and expectations have been blasted and the marriage has proved destructive to her peace and happiness and injurious to the interests and future prospects of her daughter. That ever since the marriage her husband has pursued towards her a course of injustice and oppression evincing a total disregard of her rights, wishes and feelings, and has been guilty of repeated acts of cruel treatment and outrage to her feelings, of such a nature as to render their longer living together insupportable.

The petitioner further represents that in consequence of the conduct of defendant she has been compelled to leave the common dwelling and commence a suit for separation. It is further represented that as she reposed entire confidence in her husband she had permitted him to administer all the property, whether paraphernal or otherwise, which was very large, and he had neglected and refused to provide her with the necessities and comforts of life and neglected and refused to aid her, or provide for the education and comfort of her daughter, or even permit her from her own ample means to provide for her own comfort and that of her child, whilst he was using money raised from the profits of the estate to enrich himself.

The petition then enumerates many circumstances connected with this general allegation, and proceeds to set forth her claims to her paraphernal estate and interest in the community of acquests and gains. She claims one-third of the estate called

"Marengo," with a large number of slaves on it, together with the stock of horses, cattle and other animals, and all the plantation utensils. She also claims various other property and sums of money making altogether nearly \$20,000.

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The petition concludes by stating her feelings have become entirely alienated from her husband, that she has lost all respect for him, and repeating that their living together is entirely insupportable. She therefore prays to be authorized to institute this suit, that a domicile be assigned, an adequate alimony be allowed her, that an inventory and appraisement be made of all the movable and immovable property, that an injunction issue to restrain him from disposing of any part of the property; that there be a separation from bed and board decreed; and further that she be restored to the possession and administration of her separate estate and recover one-half of the community of acquests and gains, of which she asks a partition be made.

The various initiatory orders were made by the judge as prayed for, an injunction issued to restrain defendant from selling the property during the pendency of the suit, and the house of Mr. Debruys, in the parish of St. James, was assigned as the residence of plaintiff, an allowance of \$200 per month was made for her support during the pendency of the suit, and an inventory and appraisement of all the property made in compliance with the prayer of the petition.

The defendant for answer pleads a general denial. He admits the marriage, but denies the plaintiff was a resident of Louisiana at the time or for a long time after, or that it was the intention of either to make their domicile in said State, and they did not remove into Concordia until the autumn of 1835. He says there is no justifiable cause for a separation from bed and board. He denies he has ever ill-treated the plaintiff or her daughter in any manner. He bears willing testimony to the many estimable qualities of the daughter, and also admits the plaintiff possesses many amiable qualities, but says from a constitutional defect of temperament, she will for very slight

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causes or no causes at all, fly into the most extraordinary and uncontrollable paroxisms of passion, which he says has embittered his peace of mind, and to the same causes he attributes the separation of plaintiff from her first husband. He says when she is excited she is abusive and commits acts that are unjustifiable and incompatible with the duties of a wife. That he has used all the gentle means in his power to induce the plaintiff to control her violent temper, but without success. That he has at all times endeavored to supply plaintiff and her daughter with all the necessities and comforts of life, suitable to his situation and pecuniary means, and says the complaints of plaintiff are entirely unfounded.

The defendant admits the purchase of the Marengo estate on the 15th of June, 1835, for \$137,500, which plantation with the slaves and stock then belonged to his wife, her brother and sister in equal portions, which was sold by order of the Court of Probates to effect a partition between the co-proprietors. By which purchase he says he acquired title to said property, and became liable to pay the former owners the price stipulated, and he is the owner of all the property and its increase. He says the community is burdened with many heavy debts, one-half of which plaintiff is liable to pay. He denies he has squandered or improperly disposed of any of the community property, or that he has speculated or used the means in his hands for his exclusive use, but has in all matters acted for the common benefit. He concludes by asking a rejection of the plaintiff's demand, but in the event of a judgment of separation, he prays to hold as his separate property the plantation called Marengo, with the slaves and their increase, and all the stock and agricultural implements, and that the community be finally settled and ascertained.

The separation from bed and board is claimed under the art. 138 of the La. Code, and the first section of the act relative to divorces, approved in 1827, p. 130, which says that married persons may reciprocally claim a divorce on account of excesses, cruel treatment or outrages of one of them towards the other,

if such excesses or ill-treatment be of such a nature as to render their living together insupportable.

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A great deal of evidence was taken on the trial, which has swelled the record to a large volume. There was judgment for the plaintiff decreeing a separation, restoring her to the administration of her paraphernal property, and ordering a partition of the community property, from which the defendant has appealed.

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The first question to which our attention has been called is the jurisdiction of this court. The plaintiff denies its jurisdiction so far as concerns the question of separation from bed and board, as it does not present a question appreciable in money, and as the jurisdiction of this court is limited to civil cases in which the matter in dispute shall exceed the sum of three hundred dollars, it is denied that it can take jurisdiction of the case or revise the judgment of the District Court. The jurisdiction has been expressly given by the second section of the act of 1827, and we are called on to declare this law unconstitutional. If we had doubts upon the question, we should not act upon them, in a case where the will of the legislature has been so clearly expressed, but upon this question we have not the slightest doubt of our jurisdiction.

This court will take jurisdiction of a suit for separation from bed and board, although the matter in contestation is not appreciable in money, or does not consist in a money demand exceeding 300 dollars.

The counsel for the plaintiff relies much upon the decision of this court in the case of Lavery vs. Duplessis, 3 Martin's Rep., 42, in which it was held no appeal would lie from "proceedings upon a *habeas corpus*, and that this court had no criminal jurisdiction, nor would it exercise a general superintending authority over inferior tribunals." We do not well see how the disclaimers of authority in that case, which is not similar, can be brought to bear upon this, where the power is expressly given. Whilst this court will not assume powers not given by the constitution and the law, it will not rigidly restrict its jurisdiction, and deprive a citizen by rigid rules and technical standards, of the right of coming before it, to claim his rights or redress his wrongs. We cannot believe it was the purpose of the framers of the constitution to confine our juris-

The law expressly gives the courts jurisdiction in cases of separation from bed and board, and in actions of divorce; and this court will not hesitate to act under it, when they have not the slightest doubt of the constitutionality of the law.

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diction in a question like this, to an examination of the results of a separation from bed and board, and yet deprive us of the power of examining the cause. According to the doctrine of the plaintiff's counsel, we can revise the judgment of the court settling the principles upon which the community of acquets and gains is to be settled, but we cannot say whether the causes which dissolve that community are legal and sufficient. A man who claims a slave or animal, the value of which exceeds \$300, can be heard in this court, but if a child is purloined from its parent no relief can be had from this court, according to this doctrine, because the affections and feelings of a parent cannot be valued in coin. If an action were brought to recover a child, it might perhaps be necessary to allege a loss of services, yet if it were an infant, we all know no value could be attached to its services; in this case the defendant says he does not wish to lose the services of an economical wife, and had it been required he could have made an affidavit they were worth more than \$300, and thus given jurisdiction.

After having for more than a quarter of a century entertained jurisdiction of cases of this description without question, we are not disposed to abandon it upon the grounds assumed.

Upon affidavit made, and in consideration of its being the first term, a continuance should be allowed; but if on appeal it appears that by the admissions of the adverse party, &c., no injury is sustained by going to trial, the case will not be remanded on this account.

The next question is, in relation to the continuance asked for in the court below. Upon the affidavit made, and in consideration of its being the first term of the court, we think the cause should have been continued, and if it were not, that we are of opinion the judgment cannot under all the circumstances, be maintained in those parts to which the testimony sought was applicable, we should remand the cause for a new trial, but that is not necessary, as we view it at present. We have looked at the whole record in reference to this question, and find that by the admissions of the plaintiff as to what some of the absent witnesses would testify, and by the exertions of defendant in procuring the depositions or attendance of others, the case has been fully examined, and no injury has been sustained by the refusal to continue it.

Upon the main question of a separation from bed and board, WESTERN DISE.
we are of opinion the plaintiff has failed to sustain her action. October, 1844.

In this court the case has not been argued upon the ground of any personal violence being offered to plaintiff, or that any abusive language has been used of or to her. The evidence completely negatives any such assertion, and we have given it a most attentive consideration. The remarks which the defendant may occasionally have made as to some of the accounts the plaintiff had created, or in relation to trifling articles used by her daughter, are not worthy of the importance that has been attached to them, and we find no evidence to sustain the allegation he ever attacked the character of the plaintiff's deceased father.

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The impressions which the mass of testimony taken in the cause have made on our minds are, that the plaintiff is a woman of a nervous and very irritable temperament; easily excited and incapable or unwilling from long indulgence to exercise any control over her passions when aroused. This seems to be the opinion of those who have known her long and intimately, and when she left the matrimonial domicile or shortly before, she appears to have been highly excited from various causes, and a physician who testified on the trial, says he thought "it was a mental derangement." That the warmth of her temperament is constitutional or of long standing is evident from the statement of one of the witnesses, who says she saw her throw a silver slop bowl at the head of her first husband, who however acknowledged on his death-bed he had done her much injustice. The defendant is represented as a man of respectable character and intelligence, on all occasions he appears to have treated the plaintiff with respect and kindness, when she was excited, he either endeavored to pacify her, was silent, or left the house, and more than one witness deposes, that plaintiff has said, that no matter how abusive she was to him, he never would say any thing unkind to her. When the final separation took place, though both parties were then highly excited, it appears from the testi-

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mony of plaintiff's sister, that the defendant used no ungentlemanly expression in the conversation that took place.

The presiding judge of this court in the case of *Fleytas vs. Pineguy*; 9 La. Rep. 419; said, "husbands are men, not angels;" and the evidence in this case induces us to doubt, if all of the othersex are entitled to claim the attributes of angels.

The principal reliance of the plaintiff in this court has been, that the defendant has not supplied her and her daughter with the necessaries and comforts of life, in a style suitable to the fortune she brought into marriage, and that which the parties now possess. As to what are comforts and necessaries, there may be various opinions, and it is not easy to define them. But we can from the evidence, safely express our belief that a large majority of the wives in the country are not as well supplied with the comforts and necessaries of life as the plaintiff seems to have been. Several witnesses say, she and her daughter had not a sufficiency of clothing, the house in which they lived was not as good or as well furnished as it should be, the carriage was old, and she had not a sufficient supply of money to spend, although she was a very economical lady. When we come to examine the particulars, we find that the plaintiff and daughter were not altogether deprived of what was necessary and comfortable, but they were not supplied in that style which suited the taste of some of plaintiff's friends. It appears from the complaints of plaintiff to a few of her intimate associates, the defendant did not give her as much money as she thought she had use for, and neglected or delayed payment of some of her bills, and of his own debts. It is not shown how much money he gave her, or that he unreasonably refused it when he had it, but it is shown she had a general credit in Natchez, which from the accounts in the record seems to have been freely used, she and her daughter always appeared well dressed; and it is shown that defendant finally made an allowance of \$600 per annum to plaintiff and her daughter, to supply their wardrobes alone, which the former insisted should be increased to one thousand dollars.

That some one or two of the bills of plaintiff were not promptly paid appears to be true, and that some of defendant's own debts were not paid is equally true, but that is not a legal cause for a separation from bed and board; if it were, we fear the dockets of our courts would show a much larger number of suits like this, than they happily do.

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From the testimony, it appears the defendant is an enterprising and industrious man, prospering by a system of prudence and rigid economy, more commendable in his situation, than a course of extravagance. He appears to have contracted some very large debts, and remembers it is a duty to be just, before he is generous even to his own household.

Towards the plaintiff's daughter, the defendant appears to have conducted himself with kindness and general attention. We see nothing to censure in the manner he has treated her. That the expenses of her education are not all paid, is not a reason that can sustain this suit.

The doctrine laid down in the case of *Tourné vs. Tourné*; 9 La. Rep. 452; in relation to excesses, cruel treatment and outrages, has been pressed on us in this, but we are unable to apply it, as the facts will not sustain us in so doing. It is said, it is impossible for the parties to live together again after what has occurred, and we had as well affirm the judgment of separation. The same arguments were advanced in the case cited, and in that of *Fleytas vs. Pineguy*, without effect. We cannot admit their force now, and do not despair of seeing reason and a proper sense of what is due to propriety, resume their supremacy, and yet hope the plaintiff will return to the matrimonial domicile, and again resume the position she has occupied in society, the affections of her husband, and the estimation of her friends.

Living unhappily together; having frequent differences, ebullitions and displays of temper, but without any personal or other violence; the want of supplies or necessities according to the wife's demands; the non-payment of her bills promptly, and education of her daughter; the want of support according to her rank and fortune she brought to the marriage, and supposed impossibility of the parties ever living together again, are not sufficient cause of separation from bed and board.

Our judgment upon this part of the case makes it unnecessary to say anything in relation to the property in community between the parties, of which the defendant will retain the control as provided by law, further than as it may be connected with other questions.

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It is alleged and proved beyond question, that the plaintiff brought into marriage a large paraphernal estate, of which the defendant has had the administration; she now claims the restitution of it. To this she is clearly entitled. La. C. arts. 2360, 2361, 2364, 2368; 8 Martin N. S. 229; 10 La. Rep. 136; 3 Martin N. S. 612. But to ascertain of what that paraphernal estate is composed, is a question of more difficulty.

The plaintiff claims one third of the plantation called Marengo, situated in the parish of Concordia, with all the slaves on it on the 15th of June, 1835; the stock of horses, cattle and all other animals with the plantation, utensils, &c.; also one third of the slaves born since that date, and a considerable sum of money received, which belonged to her.

We will first consider plaintiff's rights to the one third of the Marengo property. The defendant contends the whole belongs to the community, and if plaintiff is entitled to any thing, it is only the price at which he purchased it. To understand this question and some others that arise in this case, it is necessary to state how this property was acquired.

This estate was the property of plaintiff's father, James Kemp, who died, leaving six heirs to inherit it. In 1831, this property was sold at a Probate sale and purchased by three of the heirs, to wit: Jane Girault, now the plaintiff, her sister Mrs. Frances E. Sprague, and their brother, James Kemp, for the sum of \$70,100; payable at different terms, and the price secured by a mortgage on the property. The portion of each heir was \$11,683 33. The portion of the two minors bore interest at 8 per cent. from the 31st of December, 1831. For which notes were given by the purchasers.

Sometime after this, D. B. Kemp, one of the minor heirs died, and his five brothers and sisters inherited his portion, which, on the 15th of June, 1835, amounted with the interest to \$14,915 71, and the portion of each heir to \$2,983 14. On the last mentioned day, the whole property was again sold by the Probate Judge, under a judgment of that court, for the purpose of effecting a partition among the co-proprietors, one

of whom, James Kemp, had also died, leaving two minor children. The terms of this sale were two thirds in cash, and the other third coming to the minors in five equal annual instalments with 10 per cent. per annum interest until paid. Upon these terms the defendant purchased the Marengo estate with seventy-six slaves, and all the stock and plantation, utensils, for \$112,500; he also agreed, to pay the above mortgage of \$14,915 71, in favor of D. B. Kemp's heirs, also two mortgages of \$4,000 each, given by plaintiff and her sister, Mrs. Sprague, and some other sums, making the sum of \$137,500.

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This sale, the defendant contends, divests the plaintiff of all her title to the one third of the property she owned, and vests it in the community, it being liable to her for the price only. The plaintiff contends that by this sale she is not divested, as her husband could not purchase her property, all sales between husband and wife, unless in special cases, being prohibited.

Before proceeding to notice this question, we will dispose of one, which although not very material, at this time is one much relied on by defendant, as affecting this question. It is, that as there was no community existing between plaintiff and defendant previous to this sale, they not being residents of this State until then, the whole estate not only became community property, but that defendant is only bound to account to plaintiff for one half of the price, and not for that until the community is dissolved. To this we cannot give our assent. It appears to us it is shown, the plaintiff always had her legal domicile in this State, and the fact of her marrying in another State, where she was temporarily residing, does not deprive her of her legal rights and control over her property. Admitting all that was said about going to Illinois to be true, the parties never went there, and mere words cannot control acts and conduct so palpable in their consequences as are exhibited in this case. It is stated by one witness, that when plaintiff expressed a wish to reside in Illinois, the defendant said he

Where a woman has her domicile here, and marries in another State, it does not prevent a community of acquiescence and gains from existing, when the parties afterwards remove to Louisiana.

WESTERN DIS. would not consent to it, as the laws of Louisiana afforded protection to the property of married women. This question must
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therefore be considered in reference to our laws.

That the title to the whole estate called Marengo, with the

In a judicial sale for a partition among several heirs, the husband of one of them may purchase the entire property sold, which becomes community property from that time; he being responsible to the wife for the price only.

slaves and Stock thereon, on the 15th of June, 1835, was by the sale and purchase then made, vested in the defendant, and therefore community property, we have no doubt. The proceedings which were had previous to this sale, were for the purpose of effecting a partition of the joint estate; they were provoked by Mrs. Sprague and her husband, the plaintiff and defendant both being defendants, and a special allegation without denial, that they are residents of Concordia. The sale was a forced and judicial one, for the purposes of partition, and at such a sale we think a husband may be a purchaser, and by it vest all the interest of the wife in the community, it being responsible to her for the price only. This view of the case is, we think sustained by the La. Code arts. 1263, 1265, 1304, 2341, and 1 Martin N. S. 463; 12 La. Rep. 172; 17 Idem 296.

The articles of the Code which prohibit sales of property between husband and wife, relate to those which are not judicial in their character, and in some of them, the husband could not purchase, until a recent act of the legislature, in consequence of the peculiar relation in which he or his wife stood towards the estate. But we see nothing in the law to prevent a husband from purchasing at a probate sale of the

Where, in a purchase by the husband, the portion of the wife in the estate sold is imputed to the extinguishment of the price to be paid by him, he is bound to her for it, with a legal mortgage to secure it, if he administers her paraphernal estate.

succession, to which his wife is an heir, a portion or the whole of the property, composing it, and holding as if such property were purchased from any one else. If he afterwards receives her share in the succession, he is responsible for it to her, as her paraphernal estate. If the executor or administrator should call on the husband to pay the price of property so purchased, we do not see how he could oppose as compensation the interest which the wife has in the succession, without her consent. But should the portion of the wife be imputed to the extinguishment of the price to be paid by the husband,

then he is unquestionably bound to her for it, and she is entitled to a general mortgage to secure her interests, if her husband administers the paraphernal estate.

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The dower of the wife may be sold for particular purposes, such as paying debts she owed at a certain period, previous to the marriage contract, and we know of no good reason, why the husband cannot purchase at such a sale; yet the law imposes more restrictions on the sale of dotal than paraphernal property.

It has been urged on us with much zeal, the interests of the husband and wife should never be opposed to each other, and the former be placed in a situation, where it would be his interest to purchase the property of the latter, for less than its value. There is force in the argument, and it should not be done, whenever it can be avoided; but as long as husband and wife are considered as partners merely, cases must sometimes arise, wherein their interests will be in real or seeming opposition, and it is then generally best, to act upon the principle, that the husband will be more disposed to protect the interests of his wife, than that he will be to defraud her. In sales made for a partition, the interests of the co-proprietors will in general be a strong guarantee and protection to the interests of the wife, where the husband purchases the whole estate, and in cases where there are no co-proprietors, or where there is, it is better the husband should stand in a position, where he can protect the interests of his wife, although he may possibly abuse the trust, than that he should be bound to stand by powerless, and see her interests subjected to the combinations or cupidity of strangers.

These views of the case are most favorable to the interests of the wife, because she not only gets the price the property may sell for at auction, but the property then goes to enrich the community in which she is a partner. As to the community generally, we think this the most beneficial interpretation we can give the law, as it relieves the property of the citizen from some of the burdens that encumber its alienation.

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The defendant must therefore account to the plaintiff for one-third of the price, for which the plantation and slaves sold. But what that sum is, seems to be a contested question. The plantation was bid off for \$112,500, "*subject to the payment of the mortgages specified.*"

One of the mortgages specified was in favor of D. B. Kemp's heirs for \$11,683 33, with 8 per cent. interest, from the 31st of December, 1831. The defendant contends, that as the plaintiff was a debtor for one-third of that sum, and afterwards became an heir for one-fifth, as to her there was an extinguishment of the mortgage by confusion, and he is not bound to pay her the fifth of D. B. Kemp's mortgage. If this were to be permitted, the defendant would benefit by the inheritance from David B. Kemp, and not the plaintiff, who was the real heir. Whether correctly or not, this mortgage was supposed by all parties to exist at the time of the sale in 1835, and it formed a part of the price defendant was to give for the property. If it had not existed, he would have been obliged to have paid that much more for the land, for we do not understand that the mortgages were to be paid out of the \$112,500, but over and above that sum.

The mortgage in favor of D. B. Kemp's heirs, principal and interest, amounted at the time of the sale to \$14,915 71, of which the portion of the plaintiff was \$2,983 14, for which the defendant must account to her.

The plaintiff further claims the sum of \$3,176 36, which she says the defendant received from her sister, Mrs. Sprague, for her. Mrs. S. was also one of the heirs of David B. Kemp, and this sum was the amount of her portion with interest at the time it was paid. She acknowledged the receipt of it in an authentic act, and releases the mortgage on the Marengo property. The plaintiff says, that although in the act Mrs. Sprague says she received this sum in cash, it was in fact settled by imputing it to a debt, which Mrs. Sprague's deceased husband was owing plaintiff, and her property was therefore used by defendant to pay a community debt. The defendant

was interrogated on oath as to this transaction. To a portion of the interrogatories he objected and refused to answer, and to the portion he did answer, he responded so vaguely, that we are constrained to believe his purpose was to evade an answer; the interrogatories must therefore be taken as confessed. If the defendant had have paid Mrs. Sprague in cash, as the act says he did, nothing could have been easier, than for him to say so, and we cannot see, how it would have committed him to any third person. He must therefore account for the sum claimed, as we think it is sufficiently shown, he used a debt owing to plaintiff, to pay a debt of the community. This opinion is based entirely on the answers which the defendant gave to portions of the interrogatories and the effect of his refusal to answer the remaining portions of them. It therefore becomes unnecessary to express any opinion upon the bill of exception taken to the testimony of Mrs. Sprague on this part of the case.

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The plaintiff further claims the sum of \$2000, the amount of a draft drawn by both plaintiff and defendant, on Sturges Sprague, of Natchez, who was plaintiff's agent in the management of her affairs, previous to and sometime subsequent to her marriage with defendant. This draft was drawn sometime after the marriage of the parties, in 1834, in the State of New York. It is shown, neither of the parties had money at the time to enable them to return to Louisiana, and this mode was adopted to raise the means. It is admitted, the defendant at the time had no funds in the hands of Sprague, to whom he was a stranger. The draft was paid by Sprague, and was in plaintiff's possession at the time of the trial, which creates a presumption, she had paid it. It was at any rate enough to throw the burden of proof on defendant, to show he had paid it, or had funds in Sprague's hands; 13 La. Rep., 13, 367. This he has not done, although he has had an opportunity of discharging himself by answers to interrogatories propounded to him. For this sum he must also account.

The next claim is for the proceeds of the sale of a slave

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which belonged to plaintiff previous to her marriage, who seems to have been a house servant or personal attendant. When the plaintiff left for New York in 1833, she left this slave with her sister in Natchez, where the slave remained until her return after her marriage. Sometime after their return, defendant sold this slave for \$800. It is proved, the slave was on the Marengo plantation with plaintiff previous to her marriage, and there is no doubt, she once belonged to her. The defendant says, that as the slave was in Mississippi, where property of that description is considered personal, and as there was then no community of property existing between him and his wife, the title of this slave was vested in him by the marriage. We have heretofore expressed an opinion as to the time the community commenced, and we do not think, that because the parties and the slave were temporarily in Mississippi, that the right of property sanctioned by the laws of this State, was changed. The admission of such a doctrine would change the character of the title to slave property in every State, through which a person might pass, attended by one of his domestics. The defendant must therefore account for this sum.

The next sum claimed is \$375, which was received on a check given to plaintiff in her own name, by Sturges Sprague, her former agent. It is dated January 12, 1835, a short time after the parties arrived at Natchez or Concordia. The defendant in his answer to interrogatories, says, he thinks he received the money, but he adds, he "believes it was received for plaintiff, and expended by her, or specially for her individual benefit." As the admission of the receipt of the money is not definite, and there is a probability of it being used by plaintiff, we do not think she ought to recover it.

The last demand is for the sum of \$90, received by defendant for some cattle, that were sold, which belonged to plaintiff. This sum appears to be proved.

From these sums the defendant is entitled to have deducted the sum of two hundred dollars, advanced to the plaintiff previous to their marriage, and he is also entitled to a further deduction, for the share of the wife in the marriage charges, from the date of the marriage in April, 1834, to June 15, 1835, a period of fourteen months, during all which time the daughter of plaintiff was being educated at Troy, in New York. The article 2366 of the Code says, if all the property of the wife be paraphernal, and she have reserved to herself the administration of it, she ought to bear a proportion of the marriage charges, equal, if need be, to one half her income, and in case of separation of property, she must contribute in proportion to her fortune, and to that of her husband, both to the household expenses and to those of the education of the children, but if nothing remains to the husband, she is bound to pay all those expenses alone; La. Code, art. 2409. It is very satisfactorily shown, that from the time of the marriage to the purchase of the Marengo estate, the defendant had very little or no property, whilst the plaintiff had a large property, which was administered by her; she is therefore bound to contribute at least one half to the matrimonial charges, which we think a full compensation for the amount of the draft drawn by them on S. Sprague, and the price of the slave Dinah, sold as before stated.

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If the wife have a fortune, and is in the administration of it, and the husband little or none, she is bound to pay or contribute at least half of the matrimonial charges.

The defendant, as we infer from the statements presented and the arguments of his counsel, also claims a credit for \$4000 and interest paid by him, it being a separate debt of the plaintiff, secured by a mortgage on the Marengo plantation and slaves. This we think he is not entitled to, as by the terms of the sale he was to pay the mortgages mentioned in it as a part of the price.

The amount of the plaintiff's paraphernal claims which are allowed, consist of:

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WESTERN DIS.		One-third of the sum of \$112,500, the sum for	
October, 1841.		which the plantation called Marengo, with all the	
BOWLEY		slaves and stock sold on the 15th of June, 1835,	\$37,500 00
VS.			
BOWLEY.		The sum received from Mrs. F. E. Sprague,.....	3,176 00
		The portion inherited from D. B. Kemp,.....	2,983 14
		The draft on Sturges Sprague drawn by plaintiff	
		and defendant,.....	2,000 00
		The price of the slave Dinah sold,.....	800 00
		Amount received for cattle sold,.....	90 00
			<hr/>
			\$46,549 14

DEDUCT.

Plaintiff's proportion of the matrimonial charges	
from the time of the marriage to June 15th,	
1835,.....	\$2,800 00
Advances by defendant to plaintiff pre-	
vious to the marriage,.....	200 00
	<hr/>
	3,000 00
Amount of plaintiff's paraphernal estate,.....	<hr/>
	\$43,549 14

For the sum of \$2983 14, we think the plaintiff has a special mortgage on the plantation called Marengo, and all the slaves and stock sold on the 15th of June, 1835, having inherited it from David B. Kemp; for the remainder of her claim amounting to the sum of forty thousand five hundred and sixty-six dollars, she has a legal mortgage on all the property of her husband, the defendant; for the sum of \$37,390, part thereof, to take effect from the 15th of June, in the year 1835, and for the sum of \$3761, the other part thereof, a like legal mortgage to take effect from the 15th day of October, 1839, it being the date said sum was received from Mrs. F. E. Sprague.

The wife is not entitled to interest on recovering her paraphernal property, when the husband administers it, or when it is administered indifferently by the husband and wife; as the fruits of paraphernal property, except the young of slaves belong to the community.

We do not think the plaintiff is entitled to recover any interest on the amount allowed her, previous to the rendition of the judgment in the District Court. By article 2363 of the Code all the fruits of the paraphernal property, with the exception perhaps of the young of slaves, belong to the community, when the husband administers the property, or when it is

administered indifferently by the husband and wife. In this case, there exists a community, and the paraphernal estate appears always to have been administered by the defendant, or by him and the plaintiff indifferently; the disposition of the profits is therefore regulated by the article of the Code above cited.

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When this action was commenced, the District Judge assigned the plaintiff a domicile at the house of Mr. Debruyss in the parish of St. James, and allowed an alimony of \$200 per month, for the support of herself and her daughter. This allowance the defendant never paid her, and during the pendency of the case in the District Court, a rule was taken on him to show cause why an execution should not issue, to enforce the payment of it. She also took a second rule on him, to show cause why the domicile should not be changed from the parish of St. James, to the house of a person residing in the parish of Concordia. To the first rule the defendant showed for cause, that the allowance was excessive, that plaintiff had the use of one or more servants, which she was not entitled to, and that she had left the domicile assigned her without the assent of the judge or the defendant. To the second rule he answered, the court had no right to change the domicile first assigned plaintiff, without his (defendant's) assent, and that he peremptorily refused to give.

As to the first question, we do not think the allowance under the circumstances of the case is excessive. The plaintiff had a large property previous to her marriage; the defendant has had the benefit of it, and retains possession of upwards of \$43,000, without interest, up to the time of the judgment. By an agreement between the parties, which is of no validity, he had engaged to pay her the highest rate of conventional interest on about \$41,000, which he has never paid, he therefore complains with a bad grace of the sum allowed for alimony.

As to the second question, we think the plaintiff has not lost her right to alimony by leaving the domicile assigned her. It is in evidence, she left it once and went to New Orleans to con-

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sult with her counsel in relation to her business, in consequence of having some papers served on her by the sheriff of the parish of St. James, which she supposed it was necessary to communicate to her counsel. She left on Friday and returned the Sunday following. The other instance in which she left the domicile, was about a week or ten days previous to the commencement of the court, at which she expected this suit would be tried, and it is in evidence, it was necessary she should be in a convenient situation to consult with her counsel and communicate information to them. We think the reasons very sufficient, to authorize the plaintiff to leave the domicile assigned

During the pendency of a suit of the wife for a separation from bed and board, the wife may leave the home assigned as her residence on business, and be temporarily absent.

her. We do not understand the law to mean, the wife must never quit the house assigned as her residence. It never intended she should be imprisoned and not go out without the leave of the husband or the judge. If she leaves the assigned residence for necessary purposes, and only for a reasonable period, she loses none of her rights by so doing. We think a correct view of this question was taken in the case of *Le Beau vs. Trudeau*, 1 Martin, N. S., 93.

The district judge deducted from the amount of the alimony due on the 20th of June, 1841, the services of a slave which the plaintiff had in her service, and ordered an execution to issue for the remainder. In so doing we think he decided correctly, and the judgment on the rule must be affirmed with costs.

A judgment for alimony may be given, even when no separation from bed and board follows.

The court may in its discretion, change the residence of the wife during the pendency of her suit for separation.

But it is contended if no judgment of separation is given, there can be no judgment for alimony. We think differently, and the case in the 1 Martin, N. S., 93, is directly in point.

As to the second rule to show cause, we do not think the court erred in changing the residence of the plaintiff. The mere will of the defendant is not a sufficient reason to prevent the court from acting; and we think it a sufficient reason that she wished to be in the parish where she had long resided, where her friends are, and the property in which she is interested is situated.

The judgment of the District Court is therefore annulled.

avoided and reversed, and this court proceeding to give such judgment as in their opinion ought to have been given in the court below, do order, adjudge and decree, that so much of the plaintiff's demand as relates to a separation from bed and board, and a dissolution, settlement and partition of the community of acquests and gains existing between the said plaintiff and defendant, be finally rejected and dismissed. And it is further ordered, adjudged and decreed, that the plaintiff, Jane Rowley, be restored to the administration of her paraphernal estate, separate from and without the assistance or interference of her aforesaid husband, Charles N. Rowley, and that she recover of and have judgment against him, said Rowley, for the sum of forty-three thousand five hundred and forty-nine dollars and fourteen cents, with interest thereon at the rate of five per centum per annum from the third day of July in the year 1841, until paid, which is the amount of her paraphernal property received by her aforesaid husband, to secure the payment of said sum, with the interest thereon; she has a special mortgage on all that plantation called Marengo, situated in the parish of Concordia, together with all the stock of horses and cattle of every description, with the agricultural implements thereon and seventy-six slaves named and described in the sale thereof on the 15th day of June in the year 1835, for the sum of two thousand nine hundred and eighty-three dollars and fourteen cents, (\$2983 14,) part of the aforesaid sum, to take effect from the date last aforesaid; and for the sum of thirty-seven thousand three hundred and ninety dollars, (\$37,390) another part of the aforesaid sum, she is decreed to have a legal mortgage on all the property of the said Charles N. Rowley for reimbursing the same, to take effect from the last aforesaid date; and a like legal mortgage as the last mentioned, for the sum of three thousand seven hundred and sixty-one dollars to take effect from the 15th day of the month of October, in the year 1839: the costs in the District Court to be paid by the defendant and appellant, those of the appeal by the plaintiff and appellee.

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APPEAL FROM THE COURT OF THE TENTH DISTRICT, FOR THE PARISH
OF NATCHITOCHES, THE JUDGE THEREOF PRESIDING.

The last article (3521,) of the La. Code, which repeals all laws in every case, provided for in the Code, itself, applies not in every particular instance or cause, but to every *category* or *class of cases*, or *subject matter* upon which the Code contains express provisions, and abrogates all previous laws on these subjects.

The competency of witnesses is a distinct subject of legislative enactment. It is expressly and precisely treated of by the Code, (article 2260;) and it lays down all the great and leading principles of the law of evidence.

The article 2260 declaring who shall be a competent witness to prove any *covenant or fact*, whatever, in civil matters, makes no exception of any particular covenant or fact whenever parol evidence is admissible under the general provisions of the Code; and the act of 27th March, 1823, so far as it renders the maker of a note, &c., an *incompetent witness* in an action against the endorser, is **REPEALED** by the last and repealing article of the Louisiana Code.

The repealing act of 1823, left in force the Louisiana Code, and also the law respecting the competency of witnesses; leaving the question still open, whether that competency as relates to makers of notes and drawers of bills, &c., was to be determined by the Code or act of 1823.

The general rules of evidence established by the Louisiana Code must be considered as applicable to all contracts whatever.

This court has held (in 5 La. Rep. 493,) that a part of the act of 1808, relative to proceedings upon prison bonds was still in force, notwithstanding the repealing act of 1823, and the Code of Practice.

A notary public, who is the son of one of the endorsers on a note, is not thereby rendered incompetent to make protest and give notice to all the parties.

A sheriff, who is the son of the plaintiff, in execution, is nevertheless competent to execute it.

So the grand-father of a legatee is a competent witness to a Will. The official act may be valid, and yet the public officer, be incompetent as a witness in any controversy growing out of the act.

This is an action by one endorser against his two previous endorsers, on a note for \$3000, dated the 6th April, 1838, payable to the order of P. Petrovic, 24 months after date, and which was discounted in bank; protested for non-payment, and taken up by the plaintiff under protest. He now sues

and prays judgment against his two previous endorsers, as being liable to him.

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The defendants admitted their signatures, but averred they endorsed the note in blank before its date, for the accommodation of the maker, T. W. Reed, and that it was only to be filled up for the sum of \$1000. They then set up a special defence against the plaintiff; charging him with having received the note from Reed; divesting it from the original purpose and use intended; and of having it discounted for his own benefit and for a much larger sum. They released Reed, the maker of the note, and offered him as a witness to prove their defence. He was objected to as incompetent to testify under the act of 1823, rendering makers of notes incompetent witnesses in suits against the endorsers. The protest of the note and certificate of notice was objected to as inadmissible in evidence, because the Parish Judge who made the protest, was the son of the plaintiff.

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There was a verdict and final judgment for the plaintiff, from which the defendants appealed.

Dunbar & Hyams, for the plaintiff, maintained:

1. That the objection to the legality of the protest of the note sued on, because the Parish Judge who made it, was the son of the plaintiff who seeks to avail himself of it, is unfounded. At the time the protest was made, the bank was the holder of the note; "a certified copy of the protest and certificate of notice is good evidence of all the matters therein stated." Acts of 1821 and 1827, relative to protests.

2. It is clear that when Judge Waters made the protest, the bank being the holder of the note, he was not prohibited from performing such duties; then the evidence of these acts as performed by him must, in the language of the law, "be good evidence of all the matters therein contained." The judge is not called on to testify in this case, and if he was, he is incompetent to testify against, in favor, or of any thing beyond it; or which strengthens his official acts as declared and set forth in the certificate of protest. 17 La. Rep. 368.

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3. The law of 1827, relative to notaries and notarial protests, is subsequent to the La. Code, and contains no provisions incapacitating notaries on account of relationship.

4. The bill of exceptions taken to the rejection of Reed as a witness, because he is the maker of the note, is not well taken, as he is expressly excluded by the act of 1823. This act must be still in force, unless *expressly* or *impliedly* repealed.

There exists no law expressly repealing it; nor has it been repealed by any new law containing previous contrary to or irreconcilable with this act. Its existence and operation has never until now been doubted. On the contrary it has been expressly recognized on several occasions as being in full force.

5. It is contended that this law is repealed by implication in virtue of the article 3521 of the Louisiana Code repealing all statutes of the State, which have been specially provided for in the Code. We say the case of the rejected witness is not provided for in the Code; and because it declares some incapacities in witnesses to testify, it does not follow that it repealed all others. The question now is, has it been specially provided in the Louisiana Code, that all persons with regard to all contracts are competent witnesses, if they do not come within the exceptions contained in article 2260 of the Code?

6. The contract, with regard to which this question arises is one coming under the commercial law; the principles of which were to have been embodied in a commercial code, (art. 2798 of the La. Code); therefore the provisions of the Louisiana Code, do not embrace this subject of the law: or touch the question now under consideration. The act of 1823 must consequently be considered in full force.

7. Finally, it appears that this court as far back as June, 1827, in the case of Flower vs. Griffith, 6 Martin, N. S., 90, gave a judicial interpretation to the article 3521 of the Louisiana Code now in question, denying all power to the juriconsults who drew up the Code to repeal any of the former laws; and it was in consequence of that decision that the legislature

at its next session passed the celebrated *repealing act of 1828*, in which the old code was repealed and all former civil laws; but the 25th section of this act expressly excepts the competency of witnesses; see Session acts of 1828, p. 160; 5 La. Rep., 494.

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Boyce & Dunn, for the defendant and appellant, contended:

1. The defendants and appellants rely on the reversal of the judgment on the ground that the judge *a quo* erred in admitting the act of protest and notary's certificate of the manner of giving notice of protest to the endorsers; said act having been performed by the son of plaintiff, who could not be examined as a witness or give testimony in the case; La. Code, art. 2260.

2. This court has frequently held that a protest is not an authentic act within the meaning of 2231 article of the La. Code; see 16 La. Rep., 563; and that it is not an official act; 15 Idem, 555; and that it is not indispensably necessary that a notary should make a demand of payment of a note and give notice, but that any other person may do it; the mode of proof only being different; 16 Idem, 282. Will the acts of the plaintiff's son then be received as evidence, when he would be wholly incompetent to testify in the case if present?

3. The court erred in not permitting Reed to testify after we had released him, as he then stood indifferent to all the parties and was without interest; this was enabling the plaintiff to commit a fraud on the defendants, which it was the duty of the court to prevent; see 18 Johnson's Rep., 167; Bayley on Bills, 594 to 598.

4. The law or act of 1823, to which the judge *a quo* referred is not considered applicable to this case; and if it is, we conceive it has been repealed by the great repealing act of 25th of March, 1828, and by the adoption of the Civil Code; 13 La. Rep., 198; acts of 1831, page 114. Reed was therefore a competent witness; 8 La. Rep., 120; 13 Idem, 488; 2 Starkie on Evidence, 180, 181 and notes; Bayley on Bills,

WESTERN DIS. edition of 1836, 525 to 529, 544, 549; La. Code, arts. 2260,
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5. The cause should be remanded for a new trial, with instructions to the judge *a quo* not to reject Reed's testimony. We would then be able to prove all the matters set up in our answer, and thereby entitled to a judgment in our favor.

Bullard, J. delivered the opinion of the court.

This is an action against two of the endorsers of a promissory note by another and subsequent endorser, who alleges, that he took it up after protest.

The defendants admit their signatures, but aver, that about a year previous to the date of the note they endorsed it in blank for the accommodation of the drawers, to enable them to raise one thousand dollars for the use of the steam boat John Linton, of which one of them, T. W. Reed, was then captain. That the note was not dated, nor for any particular sum, but it was well understood, that it should be filled up for one thousand dollars, payable at twelve months. That Reed not having it discounted, and not having use for it, was asked by Waters, the plaintiff, to lend it to him; that he was hard pushed, and that if Reed would let him have it, he would try and get it discounted in Bank, and at its maturity he would pay it and return it to him. That Reed then told him under what circumstances these respondents endorsed the note, and that he could not use it in that way. But Waters assured him, that if he would let him have the use of the note, he would pay it at maturity, and return it to him. That Reed finally consented to lend him the note, and that Waters then got Reed to fill up the blank for three thousand dollars, but leaving the other spaces in blank; that Waters kept the note some time, and then had it filled up, making it payable to the order of P. Petrovic, one of the defendants, dated it, and made it payable twenty-four months after date, at the office of the Canal and Banking Company of New Orleans at Alexandria, got it endorsed by James Norment

and J. R. Mead, and had it discounted for his own accommodation. They aver, that the plaintiff never gave any value for the note, but that he obtained the same by fraud and false pretences, having a full knowledge of all the circumstances.

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There was a verdict for the plaintiff, and judgment having been pronounced thereon, the defendants appealed.

During the progress of the trial, the defendants offered T. W. Reed, one of the drawers, as a witness, to prove the facts set forth in their answers, after having tendered a full release of all his liability, as drawer of the note. He was rejected as incompetent, and the defendants took their bill of exceptions.

The act of the legislature of the 27th of March. 1823, "to repeal the act which authorizes a special jury in certain cases, *and for other purposes,*" provides among other things, that in no case shall the drawer or maker of a promissory note or bill of exchange be a competent witness in an action brought by the holder against any of the endorsers, to recover the capital of such note and legal interest. (See 1 Moreau's Digest, *verbo* Jury.) Under this statute we held recently, that the maker or drawer was absolutely incompetent, notwithstanding a release of all interest; 18 La. Rep., 470. But the question now presented for our consideration, to wit: whether that statute is not repealed by the general repealing clause of the Louisiana Code, was not raised in that case, nor did it occur to us. If we then overlooked it, we consider it now our duty to reconsider the question, and if we have erred, we are ready to retrace our steps.

The incompetency of the drawer of a bill and maker of a note, as a witness in any case against an endorser is unequivocally declared by the act of 1823. Has that incompetency been removed by the provisions of the Louisiana Code? That is the question.

That part of the Code, which treats of the proof of obligations and of that of payments, establishes general rules relating to the cases, in which testimonial proof may be admitted, and

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The last article (3521,) of the La. Code, which repeals all laws in every case, provided for in the Code, itself, applies not in every particular instance or cause, but to every category or class of cases, or subject matter upon which the Code contains express provisions and abrogates all previous laws on these subjects.

under what restrictions, and in what cases it is inadmissible; or in other words, what contracts may or may not be proved by witnesses. It then declares, who shall be considered as a competent witness, when that kind of evidence is admissible. Article 2260 declares, that "the competent witness of any covenant or fact, whatever it may be, in civil cases, is he, who is above the age of 14 years complete, of a sound mind, free or enfranchised, and not one of those whom the law deems infamous. He must besides not be interested neither directly nor indirectly in the cause. The husband cannot be a witness either for or against his wife, nor the wife for or against her husband. Neither can ascendant with respect to their descendants, nor descendants with respect to their ascendants." Such is the general rule of competency, whenever testimonial proof is admissible, and such are the exceptions, to wit: ascendants and descendants, husband and wife, with respect to each other respectively, interest in the cause and infamy. But it is said, the act of 1823 had created another exception, to wit: the maker of a promissory note or drawer of a bill of exchange with respect to the endorser. There is no doubt, if the Code had stopped there, that the exception previously existing would have remained in force, notwithstanding the enactment of the general rule with some enumerated exceptions; because being in *pari materia*, and not repugnant to that article of the Code, containing no expression of exclusion, the act of 1823 might well co-exist with the article of the Code above recited. But the article 3521, containing the "general disposition" or repealing clause, declares, that "from and after the promulgation of this Code, the Spanish, Roman and French laws, which were in force in this State, when Louisiana was ceded to the United States, and the acts of the legislative council of the legislature of the Territory of Orleans, and of the legislature of the State of Louisiana, be, and they are hereby repealed in every case, for which it has been specially provided in this Code, and that they shall not be invoked as laws, even under the pretence, that their provisions are not contrary or repugnant

to those of this Code." By the words "*every case*," employed in this article, we understand not every particular *instance* or cause; for the Code lays down only general rules; but we take it to mean every *category* or *class of cases*; or *subject matter upon which the Code contains express provisions*.

The competency of witnesses is a distinct subject of legislative enactment. It is expressly and even precisely treated of by the Code, and in laying down the general rule, *every case* in a more narrow sense of the word, is provided for, which may occur in the application of the rule, or which is embraced within it. The Code lays down all the great leading principles of the law of evidence, and treatises upon that branch of the law will be found upon a careful analysis to contain little or nothing more than the developement of those principles in their application to particular cases, as they arise in practice. But the article first recited declares, who shall be a competent witness to prove *any covenant or fact*, whatever it may be, in civil matters; it makes no exception of any particular covenant or fact, whenever parol evidence is admissible under the general provision of the Code. This then is, in our opinion, a case or class of cases specially provided for.

But it is urged, that even the sweeping clause of the act of 1828 (section 25) spared the statute of 1823, and left it in force. That section enacts, "that all the *rules of proceeding*, which existed in this State before the promulgation of the Code of Practice, except those relative to juries, recusation of judges, and other public officers, *and of witnesses, and with respect to the competency of the latter*, be, and they are hereby abrogated, &c., &c."

It appears to us quite clear, that the act of 1828, while it abrogated all the *civil* laws in force before the promulgation of the Louisiana Code, as well as all laws regulating the practice, with certain exceptions, left in force the Louisiana Code itself; and if by that Code the act of 1823, relating to the competency of witnesses, was repealed, it is not perceived, how it could be revived by the act of 1828. The latter act left in force the law

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The competency of witnesses is a distinct subject of legislative enactment. It is expressly and precisely treated of by the Code, (article 2260;) and it lays down all the great and leading principles of the law of evidence.

The article 2260 declaring who shall be a competent witness to prove *any covenant or fact*, whatever, in civil matters, makes no exception of any particular covenant or fact whenever parol evidence is admissible under the general provisions of the Code; and the act of 27th March, 1823, so far as it renders the maker of a note, &c. an *incompetent witness* in an action against the endorser, is REPEALED by the last and repealing article of the Louisiana Code.

The repealing act of 1828, left in force the Louisiana Code, and also the law respecting the competency of witnesses; leav-

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ing the question
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notes and draw-
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then existing, respecting the competency of witnesses, leaving the question still open, whether that competency in the particular case now before us is to be determined by the Code or by the act of 1823.

But it is argued by the counsel for the appellee, that the contract, with regard to which this question arises, comes under the commercial law, and that the principles in relation to that branch of the law were to have been embodied in a distinct Code, to be designated the Commercial Code. That work has never been adopted, nor even prepared for adoption, and although it may have been the intention of the juriconsults appointed for that purpose, to embody in it the rules of evidence, particularly applicable to commercial contracts, yet until such Code shall have been enacted, the general rules of evidence established by the Louisiana Code, must be considered as applicable to all contracts whatever, except when the Code declares otherwise.

It is further urged, that in the case of *Flower vs. Griffith* (6 Martin, N. S., 90) this court gave a judicial interpretation to the article 3521 of the Code; denying all power to the juriconsults, who prepared the amendments of the Code, to repeal any of the former laws.

In the case referred to the court held, that the 27th title of the 3d book of the Code of 1808 was still in force, although not found in the new Code, and no provision had been made on the subject, to wit: the seizure in execution of the undivided share of a co-heir in a succession. It appeared to the court, that it was merely an unintentional omission in printing the new Code, the jurists not having proposed to change the law in that respect, as appeared by their report. The court said, "if any thing has been omitted, that omission does not prevent the law, which had already been promulgated in the old Code, from being in force. To decide otherwise, would be virtually a declaration, that the persons, who were appointed to print the Code, had legislative powers." In that case the Louisiana Code appeared to contain no provision on the subject

of the seizure of the undivided share of an heir; but in the case now before us the competency of witnesses is specially treated of, and there appears to us to be very little analogy between the two.

We are further referred to our decision in the case of *Jennison vs. Wamack*, 5 La. Rep., 493, in which an interpretation was given of the words *Civil Laws*, as used in the act of 1828. The court said, that the word *civil* as applied to laws anterior to the Code, must not be considered as used in contradistinction to the word *criminal*, but must be restricted as in common parlance to the *Roman Law*, and the jurisprudence of those countries, who derived their jurisprudence from it, and as distinguished from the English law or that of the other States of the Union. But we held, that a part of the act of 1808, relative to the proceedings upon prison-bound bonds was still in force, notwithstanding the act of 1828 and the Code of Practice.

There is a second bill of exceptions to the admission of the protest and certificate of notice made by the parish judge of the parish of Rapides, notwithstanding the objection of the defendant's counsel, that he is the son of the plaintiff, and consequently incompetent to furnish evidence either directly or indirectly, for his father. We are of opinion, the court did not err. The notary, we think, was not incompetent to make the protest, although his father was a party to the note. In the case of *Duplantier vs. Dawson*, we held that the sheriff was competent to execute an order of seizure and sale, although the plaintiff was his mother; and in the case of *Segur's Heirs vs. Segur*, that the grand-father of a legatee is a competent witness to a testament. The court held, the official act might be valid, and yet the witness or the public officer be incompetent as a witness in any controversy growing out of the act. 14 La. Rep., 28; 15 Idem, 289.

Being of opinion therefore, that the court erred in rejecting the maker of the note as a witness, and that the case must go

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This court has held (in 5 La. Rep. 493,) that a part of the act of 1808, relative to proceedings upon prison bonds was still in force, notwithstanding the repealing act of 1828, and the Code of Practice.

A notary public, who is the son of one of the endorsers on a note, is not thereby rendered incompetent to make protest and give notice to all the parties.

A sheriff, who is the son of the plaintiff, in execution, is nevertheless competent to execute it.

So the grand-father of a legatee is a competent witness to a Will. The official act may be valid, and yet the public officer, be incompetent as a witness in any controversy growing out of the act.

WESTERN DIS. back as to both the defendants, it is not necessary to enquire
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The judgment of the District Court is therefore avoided and reversed, and the verdict set aside, and it is further ordered, that the case be remanded for a new trial, with directions to the judge not to reject the witness Reed, on the ground of his incompetency as one of the makers of the note sued on; and that the plaintiff pay the costs of this appeal.



MAURIN & CO. vs. ROUQUER ET AL.

APPEAL FROM THE COURT OF THE TENTH DISTRICT FOR THE PARISH OF
NATCHITOCHES, THE JUDGE THEREOF PRESIDING.

A sale by the father to his son, not a creditor, *of his estate*, at a sound price, where there is no privity between the latter and the creditors of his father and none between the father and his creditors, is *valid*, although the father, was insolvent at the time, and the son agreed and did apply the *price* to the payment of *a portion* of the creditors: Nor is the mere relationship of the father and son, evidence of fraud.

The sale would be good as to the son, even if it was the intention of the father to defraud his creditors, because the contract of sale was onerous and the purchase made for the full value of the property.

Actions to annul a sale, brought by a complaining creditor, for giving an undue preference to a portion of the creditors of the common debtor, are prescribed by the lapse of one year from the date of the sale.

This is a revocatory action, to set aside a sale of *his estate* made by F. Rouquer, the father to J. B. O. Rouquer, his son, on the ground of undue preference given to some creditors over the plaintiffs, who are complaining creditors. They allege that on the 16th Jan., 1839, the father by public or notarial act made a sale of a plantation and slaves comprising all his estate to his son, who agreed and has actually paid from the price thereof, the de-

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mends and debts of sundry creditors of his father in fraud of the rights of the petitioners. They show that they obtained a judgment against F. Rouquer in November, 1839, about ten months after this sale, for \$10,000, and have not been paid and can find no property out of which to satisfy their judgment.

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This suit was instituted the 24th October, 1840, nearly two years after said sale. The plaintiffs allege it is fraudulent and made in fraud of their rights, and they pray that it be annulled and the property made subject to their demand.

The defendants severed in their answers. Young Rouquer pleaded the general issue; averred that the sale was fair and just, for the full value of the property and that he had in accordance with the contract, assumed and paid debts of his vendor to the amount of \$10,123; and has had the possession and entire control of the said estate as owner. Rouquer, the father, denied all fraud and averred the sale was fair and bona fide.

The creditors who had been paid were made parties and denied all fraud or any privity as to the sale between the father and son, or with either of them.

The plea of prescription of one year from the date of the sale *before suit*, was interposed.

On all the evidence adduced under these issues and pleadings, there was a verdict and judgment for the defendants. The plaintiffs appealed.

Boyce & Dunn, for the plaintiffs and appellants, contended that F. Rouquer was insolvent at the time of this sale, to the knowledge of his son; and the son in fact acted as agent of his father in the payment of a portion of the creditors; which was giving them an undue preference over the plaintiffs, who were also creditors and have not been paid a cent. It is a fraudulent sale as respects the complaining creditors and null as to them.

Royden, for the defendants, insisted the sale was valid. It was made to young Rouquer, who was not a creditor, and be-

WESTERN DIS. fore the plaintiffs' had any judgment against the father. It was
October, 1841. fair and bona fide and there is no cause of nullity.

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Garland, J. delivered the opinion of the court.

The petitioners represent that on the 22d day of November, 1839, they recovered a judgment against François Rouquer for \$10,000, with interest and costs, that an execution issued on the same, which has been returned *nulla bona*. That said Rouquer being insolvent, with a view to protect his property from his creditors, and particularly the plaintiffs, had by an authentic act sold and conveyed to his son and co-defendant, Jean B. O. Rouquer, an emancipated minor, the plantation on which he, François, resided, with the improvements and two slaves. In which sale provision is made for the payment of certain preferred creditors, all of which is illegal, fraudulent and void. That young Rouquer knew at the time of the sale, his father was insolvent, and purchased the property with a view to defraud them. That since the purchase young Rouquer has paid the other creditors of his father, but will not pay petitioners, but keeps the property which is liable for this debt. The prayer is, that the sale made on the 16th day of January, 1839, of the land and slaves be annulled as fraudulent, and that the same be returned to the mass of the estate of F. Rouquer and made liable to the payment of his just debts.

The defendant, J. B. O. Rouquer, for answer denies any fraud. He says he is not and never was a creditor of his father, that as a purchaser in good faith and for a valuable consideration, he bought the plantation and slaves for \$16,000. That in accordance with his contract he has paid various creditors of his father, \$10,123, from which sum as a portion of the consideration of the sale, his said father has released him, and he has given up the evidence of those claims; he names the creditors he has paid and the respective amounts paid to each.

The act of sale, dated on the 16th January, 1839, declares that in consideration of \$16,000. F. Rouquer sells and delivers to his son the tract of land mentioned with the farming utensils,

&c.; "ten thousand dollars whereof are to be applied to the WESTERN DIS. payment of debts due by the vendor at such times and on such October, 1841. terms as the purchaser shall agree upon with the creditors of MAURIN & CO. the vendor," and the balance to be paid the vendor in various vs. instalments. The vendee is also to furnish the vendor with the necessities of life until the \$10,000 is paid or settled, for which he is to have credit. J. B. O. Rouquer, at the same time sells his father the undivided half of three slaves in part payment of the tract of land, &c. In this act no creditors are named or any specific sums mentioned as due to any one, no creditor signs the act or seems to have known any thing about it, except one who was accidentally in the notary's office, but took no part in the transaction.

On the same day, F. Rouquer also sold and conveyed by public act to his son two slaves, for which he was to pay A. Somepyrac, tutor, &c., the price for which they had been sold by him to the elder Rouquer, which was unpaid. This price and interest, it was ascertained afterwards, amounted to about \$3060. This amount young Rouquer was to have credit for on the price of the land, and it formed a part of the \$10,123, hereafter mentioned. To this contract Somepyrac was no party.

After these contracts were made, young Rouquer went to the different creditors of his father, and by payments or assumption of his engagements, obtained from them the notes or other evidence of debts they held, and took them to his father, who, on the 13th day of August, 1839, went again before the notary and passed another act acknowledging the receipt of \$10,123, and the vouchers for it, in part payment of the plantation previously sold. In this act the name of each creditor is mentioned together with the sum paid. On the same day young Rouquer gave his father four notes for the balance of the price of the land, to wit: \$5877, payable in four annual instalments. This act was passed about three months before Maurin & Co., obtained judgment against F. Rouquer on his endorsements for Cortez, Laplace & Co.

At the time these acts were passed it was well known that

WESTERN DRS. F. Rouquer was in embarrassed circumstances. He estimated
October, 1841. his individual debts at about \$10,000, but they turned out to be

MAURIN & CO. several thousand dollars more. He had property to the amount
vs. of about twenty or twenty-two thousand dollars. If he could

ROUQUER ET AL. get clear of his endorsements to the plaintiffs for Cortez, Laplace & Co., for which suits were afterwards commenced, he would be solvent, if not he was clearly insolvent. The evidence to show that young Rouquer knew his father was insolvent is by no means clear, but it is certain he knew he was much embarrassed.

The plaintiffs obtained a judgment against F. Rouquer on the 22d of November, 1839, and it not being satisfied they commenced this suit on the 24th of October, 1840, more than twenty-one months after the sale from Rouquer to his son had been made, and about fifteen months after the latter had paid the creditors of the former and been discharged from so much of the price. The evidence shows the property sold for its full value and that young Rouquer has ever since had the sole management and control of it, though his father lives on the place being old and dependant on his son.

There was a mis-trial in the case in November, 1840, after which the plaintiffs amended their petition by leave of the court, and made all the creditors to whom young Rouquer had made payments on account of his father, parties to the suit; alleging they were aware of the insolvency of F. Rouquer on the 16th January, 1839, and that young Rouquer acted as *their agent* in making the purchase aforesaid, and that it was a conspiracy among all the parties to obtain an unjust preference over the plaintiffs. They therefore pray these creditors be cited, and copies of the original petition and amendment be served on them; that the sale be annulled and each of these new defendants be compelled to return the amounts they have received and that they be paid *pro rata*. The service of this petition was acknowledged by or served on different parties at various dates from November 30th, 1840, to April 2d, 1841.

These defendants appeared and answered by a general de-

nial. They say, they had nothing to do with the sale; that young Rouquer had settled his father's debts with them. They deny all fraud or intention to obtain any unjust preference and they, with the original defendants, plead prescription to this suit.

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On the second trial a good deal of evidence was introduced to show François Rouquer was insolvent at the time he executed the act of sale, and as much was received to show he was not insolvent, but only embarrassed. The result of it all is, that including his endorsements in favor of the plaintiffs, there is no doubt he was insolvent; if he should not be obliged to pay those endorsements, then he was solvent. It is in evidence, that at the time the plaintiffs had not commenced a suit against him on his endorsements, but the notes had been protested. Whilst the parties were at the notary's office for the purpose of passing the act of sale, the elder Rouquer made an estimate of his debts amounting to about ten thousand dollars and it is further shown, that about that time, he had no serious apprehensions that he would suffer by his endorsements for Cortez, Laplace & Co., as he relied on their assurances that their notes endorsed by him would be discharged by them. To rebut this the plaintiff offered evidence to show that at the time of the sale Cortez, Laplace & Co. were notoriously insolvent, and Rouquer could therefore not have had any sufficient reason to believe they would or could pay their notes. To this the defendants objected and the court refused to receive the testimony to which the plaintiffs excepted. The court very probably erred, but it is not material in this case, as we are of opinion the evidence could not affect the judgment which has been given.

All the debts of the elder Rouquer paid by his son were established on the trial, and amount to the sum for which the release was given, and no evidence was given to prove he acted as the agent of the creditors.

There was a verdict and judgment for the defendants and the plaintiffs appealed.

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The sale would be good as to the son, even if it was the intention of the father to defraud his creditors, because the contract of sale was onerous and the purchase made for the full value of the property.

Actions to annul a sale, brought by a complaining creditor, for giving an undue preference to a portion of the creditors by the common debtor are prescribed by the lapse of one year from the date of the sale.

When this sale was passed in January, 1839, it is not shown there was any privity or agreement between young Rouquer and the creditors, or between the elder Rouquer and those persons. The son was not a creditor of the father and the mere relationship is not evidence of fraud; 9 Martin, 654; 1 Martin, N.S., 535. The sale must therefore be considered as one made in the ordinary course of business, not to a creditor and therefore good; La. Code, art. 1981; 6 La. Rep., 344; 12 Idem, 266; 16 Idem, 150. The contract would be good as to young Rouquer even if it was the intention of his father to defraud his creditors, as the contract was an onerous one and the purchase made for the full value of the property; La. Code, 1973-74-76; 10 La. Rep., 345, 348. The agreement on the part of young Rouquer to pay ten thousand dollars of the debts owing by his father and his actual discharge of them by payment or novation, and the giving his notes for the balance of the price, is a valid consideration for the sale; 6 La. Rep., 536. If the plaintiffs have been injured by these payments to, or arrangement with the creditors, they cannot annul the sale on that account; but if any thing is wrong they must call on the creditors themselves. This they seem to have become aware of, after the first attempt at a trial, and then by the amended answer, the former creditors are called into the suit, and the agency of young Rouquer alleged.

Supposing it to be as asserted but not proved, that young Rouquer was the agent of the creditors, we cannot see how the plaintiffs can resist the plea of prescription tendered by the defendants. The article 1982 of the La. Code, with the decisions of this court in 3 La. Rep., 26; 14 Idem, 321; settle that question. The only ground of nullity in this case, is that an undue preference has been given to a portion of the creditors of François Rouquer. Actions based on that ground alone come under the prescription contained in the article cited, and must be brought within a year from the date of the act sought to be revoked.

The judgment of the District Court is therefore affirmed with costs.

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19. Where the drawer has no funds in the hands of the drawees and has no right to expect his bill will be paid, there being no commercial transactions between the parties, notice of non-payment and protest is unnecessary..... *ib.*

20. But where there are running accounts between the drawer and drawees to induce the former to believe his bill will be honored, he is entitled to notice of non-payment, although in fact he had no funds in the hands of the drawees. *ib.*

21. Two witnesses are required, not only to the protest, but to the record of the certificate of the notary, under the act of 1821; and this is not superseded by that of 1827; both of which require the certificate of protest to be attested by two witnesses, to be evidence of notice.

Gas Light & Banking Company vs. Nuttall. 447

22. The certificate of the notary must be recorded and attested by two witnesses, to be admissible as evidence of notice..... *Gas Bank vs. Phelps*. 452

23. Where the last day of grace for the payment of a note or bill, is a Sunday or day of rest, the protest is properly made on the preceding day.

Huie vs. Brazeale. 457

24. Personal notice of protest may be made on the endorser at any place, however distant from his domicile; and personal notice dispenses with constructive notice, by sending it through the post office..... *ib.*

25. Where the certificate expresses the name of the post office, to which notice to the endorser is sent, it is sufficient, without stating it is the nearest to his residence. A denial might, perhaps, put the adverse party on his proof, that it was the nearest..... *Gas Bank vs. Desha*. 450

26. The want of amicable demand cannot be pleaded, when the protest states that demand was made of the makers of the note, and the endorser notified that he would be looked to for payment..... *ib.*

27. Bankable interest is due on notes discounted in Bank, from the day of protest..... *ib.*

28. The fact of an endorser taking a mortgage from the maker of a note to indemnify him against loss, does not dispense with demand, protest and notice.

Peets vs. Wilson. 478

29. Where the plaintiff took the defendant's note endorsed in blank by the payee and before due, but with a knowledge of the equities existing between the original parties, amounting to a failure of consideration, he failed to recover.

Jones vs. Young. 553

BOUNDARY.

1. The southern and south-west boundary of the county and parish of Natchitoches runs from the junction of the *Rigolet de Bon Dieu* and Red River, in a direction as far south of west as will strike the Sabine River at the point where the north-west corner of the county of Opelousas touches the western bank of that stream..... *Lecomte vs. Smart*. 484

2. In settling and determining boundaries not fixed by actual observation and survey, some weight must be given to the general understanding and common acquiescence..... *Lecomte vs. Smart.* 484

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CITATION.

1. A sheriff is presumed to be acting in and executing the process of his own parish, when the contrary is not shown; and he is not required to insert the name of his parish in his returns or in making service of citation.

Kendrick's Heirs vs. Kendrick. 36

2. The law dispenses with personal service, when the defendant is absent; but the sheriff's return must state expressly, that he left the process at the *usual domicile* or residence, with a free person above fourteen years of age, *living there*; the defendant being *absent*..... *ib.*

3. The citation should state, that the answer is to be filed within *ten days after service*; allowing *one day* for every ten miles distance from the residence of the defendant to the clerk's office. *ib.*

CLERKS.

1. The certificate of the clerk of a court cannot be taken as proof of the *purport* of papers of record in his office, much less of such as are missing.

Briggs, Lacoste & Co. vs. Campbell. 524

COMMUNITY.

1. Property received as a donation from the Spanish government by one of the spouses, does not enter into the community; but remains his separate property, and descends to his heirs as such.

Fuselier's Heirs, f. p. c. vs. Masse's Heirs, f. p. c. 329

2. Property purchased during marriage by the husband, in his name, though bought with the funds of the wife, belongs to the community. So a slave received by the husband, in his own name, in discharge of a sum, which the wife inherited, is community property, as likewise the increase of the slave after the sale..... *Comeau vs. Fontenot.* 406

3. It has been held, that property acquired by the wife, as a *datien en paiement*, made to her by her tutor, and which never came under the administration of her husband, constitutes the wife's separate property; and does not belong to the community, but is paraphernal..... *ib.*

4. Where a woman has her domicile here, and marries in another State, it does not prevent a community of acquests and gains from existing, when the parties afterwards remove to Louisiana. *Rowley vs. Rowley.* 558

5. In a judicial sale of property for a partition among several heirs, the husband of one of them may purchase the entire property sold, which becomes community from that time; he being responsible to the wife for the price of her share only..... *ib.*

6. Where, in a purchase by the husband, the portion of the wife in the estate sold is imputed to the extinguishment of the price to be paid by him, he is bound

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- to her for it, with a legal mortgage to secure it, if he administers her paraphernal estate..... *Rowley vs. Rowley.* 558
7. If the wife have a fortune, and is in the administration of it, and the husband little or none, she is bound to pay or contribute at least half of the matrimonial charges..... *ib.*
8. The wife is not entitled to interest on recovering her paraphernal property, when the husband administers it, or when it is administered indifferently by the husband and wife; as the fruits of paraphernal property, except the young of slaves belong to the community..... *ib.*

CONFLICT OF LAWS.

1. So a statute of this State derogating from the established rules of evidence among nations, will be executed and obeyed as to contracts made in other States, when they are sought to be enforced here.... *Buckner, Stanton & Co. vs. Watt.* 216

CONTINUANCE.

1. A continuance will not be allowed, when due diligence has not been used to obtain the testimony of a witness, alleged to be material.
R. McCarty vs. J. P. McCarty. 296
2. Motions and affidavits for continuances are addressed to the legal discretion of the court and should be granted or denied, so as to effect a speedy termination of suits, as far as is consistent with justice..... *ib.*
3. It is no ground for a continuance, that a witness is insane, and time is asked, that he may recover, and his deposition be taken; especially when it is not shown he would be able to testify in a reasonable time.
Anderson's Administrator vs. Birdsell's Administratrix. 441
4. When the answer sets up a special contract, a continuance need not be allowed for the party to procure the testimony of a witness, as it is unimportant to the defence to prove one..... *ib.*
5. Upon affidavit made, and in consideration of its being the first term, a continuance should be allowed; but if on appeal it appears, that by the admissions of the adverse party, &c., no injury is sustained by going to trial, the case will not be remanded on this account..... *Rowley vs. Rowley.* 557

CONTRACTS.

1. The court will not presume, that parties make use of words in their contracts, to which no meaning is attached by them. Some effect is to be given to every word if possible; and but rarely will the court reject words or phrases in a contract as surplusage..... *Rolland's Heirs vs. McCarty.* 77
2. Where the act of sale of a lot conveys the object sold without any exception or reservation, together with "the privileges, rights and pretensions which belong to it; and if the extent be greater than is mentioned, it shall be for the advantage of the purchaser," every thing and all accretions, present and future, pass thereby..... *ib.*

3. Where there is no privity of contract, between the plaintiff and defendant the latter cannot be put in delay.

Agricultural Bank of Mississippi vs. Barque Jane. 1

4. Where a contract is made for the sale of a quantity of cotton in bales, for such a price as two brokers chosen by the parties shall name, the moment the brokers agreed upon the price, the sale was complete, and no new conditions could be imposed..... *Chevremont vs. Fulton et al.* 248

5. Contracts are to be decided by the law of the place where made; but there is an exception, which is, that no nation is bound to recognize or enforce contracts, which are injurious to its interests or people.

Buckner, Stanton & Co. vs. Watt. 216

CURATORS OF ESTATES.

1. Where the curator fails to comply with his duties, and pay over money, any creditor of the estate may at once resort to his action on the curator's bond against the surety..... *Bonny & Baker vs. Brashear.* 383

2. So where an estate is shown to be solvent, a creditor may sue the curator or his surety, on their bond, for the whole amount of the claim, without waiting for a distribution, when there is delay, or for other creditors to come in..... *ib.*

3. The fee of attorney of absent heirs is chargeable to their share of the estate and to the estate itself..... *Hsem vs. Leme's Curator.* 425

4. The cost of erecting tombs over the grave of the deceased, forms no part of the funeral expenses, and the curator has no authority to expend the means of the estate for this purpose without the consent of the heir..... *ib.*

5. Where the curator, in compliance with a verbal request of the deceased in his last sickness, and with the implied assent of the heir, erects tombs over the deceased and his wife, he will be allowed the sum expended, in his account against the estate..... *ib.*

6. Where a claim against an estate is unliquidated, or the curator objects and refuses to approve it, the party may sue on it in the Court of Probates; but he cannot have execution immediately, as it must be paid concurrently with other creditors..... *Anderson's Administrator vs. Birdsall's Administratrix.* 441

7. Claims against estates in the course of administration, bear legal interest from the time they are due and payable, although unliquidated..... *ib.*

8. A surety is only liable for the acts of the curator during the continuance of his bond; and for the proper application of the funds received during that time. *Brown vs. Gunning's Curatrix et al.* 462

9. The action on a curator's bond against the sureties, is not prescribed by the lapse of one year. It is an action *ex contractu*..... *ib.*

DONATION.

1. Where the defendant made a verbal donation of a slave to his son, and at his death, as one of a family meeting advised the sale of the slave, as the pro-

party of the minor child of the deceased, he cannot claim back either the slave or the proceeds, although the donation *per se* did not divest him of title.

Gillispie vs. Day. 263

2. The donor is only entitled to the reversion of the thing donated, when the donee *dies without posterity*, and it is found in his succession. *ib.*

3. The capacity of the donor to give, in relation to donations *mortis causâ*, reference must be had to the time of the donor's death, because it is not until then that the donation takes effect. *Criswell vs. Seay et al.* 528

4. So where the husband, having then two children, makes a donation or disposition *mortis causâ*, in his marriage contract, of all the property of which he may die possessed, and which he may lawfully dispose of, to *his intended wife*, if she survives him; and his children die first, leaving no forced heirs, at his death *his wife becomes his universal donee*, and is entitled to his estate. *ib.*

EVICITION AND WARRANTY.

1. Where the purchaser is actually disturbed and in danger of eviction of the thing sold, he may require security, before payment of the price can be demanded: But being in possession and enjoyment of the property, he must pay interest, or consign and deposit the price. *Ball et al. vs. Le Breton et al.* 147

2. The creditors of an estate are not bound to give security to the purchaser, before coming on him for claims due by it, on the ground that he is in danger of eviction. The right to call on a party to give security, implies a warranty against eviction. *Kenner & Co.'s Syndic vs. Holliday et al.* 154

3. The Roman law in laying down a general rule on the subject of warranty, provides that the purchaser must be indemnified to the *extent of the interest*, he had in not being evicted; on this, there are some restrictions.

Edwards et al. f. p. c. vs. Martin's Heirs et al. 284

4. In regard to agreements having for their object certain quantity or amount, as in sales, leases, &c., the damages were not to exceed the value of the subject matter of the contract. *ib.*

5. A debtor engaging to pay damages for the non-payment of his obligation, is presumed to intend only the highest damages within the contemplation of the parties at the time of the contract; and if they are such as could not have been foreseen, they must be reduced to a reasonable sum. *ib.*

6. The principles of the Roman law, which never had the force of positive law in this country, but which are founded in equity and reason, will be adopted as rules regulating the indemnity to which a party is liable on his warranty. *ib.*

7. So it is impossible that parties ever contemplated that the damages in case of eviction should be larger than the value of the subject matter of the contract. *ib.*

8. So where the vendee of a female slave purchased in 1802, was evicted and the vendor refunded the price; is afterwards evicted of her increase or children, the vendor is only bound for damages to the amount of the value or original price of said slave; and not the value of the young slaves, born of her after the sale, although much greater. *ib.*

9. A warrantor in case of eviction of the purchaser, does not owe interest in

the same manner as the purchaser who withholds the price of a thing which produces fruits..... *Melançon's Heirs vs. Robichaud's Heirs.* 357

10. The warrantor who is not in possession of the property is only bound among other obligations to re-imburse the purchase money; or a proportion of it; and he owes interest after he is put *in mora*, or from judicial demand; or if the debt is unliquidated, only from the rendition of judgment..... *ib.*

11. Fees which parties have to pay to their counsel for asserting their rights in courts of justice, have never been, nor can they be considered as costs, chargeable to the party cast. It is only taxed costs which a warrantor is bound to reimburse to his vendee..... *ib.*

12. Where a third person is interposed and sued as a trespasser, and disturbing the plaintiffs in their possession and title to land, and the vendors of the plaintiffs are called in warranty, they will be discharged and released when it is shown the action against the immediate defendant is simulated, or when the suit fails or is not prosecuted as to him.... *Parrott et al. vs. Edwards et al.* 336

EVIDENCE.

1. Proposals for a compromise or conversations about it are not generally admissible in evidence; but if any fact or distinct liability is admitted, evidence of it may be given, allowing the party the benefit of all the propositions or conversations which took place.

Agricultural Bank of Mississippi vs. Barque Jané, &c. 1

2. An agreement proved by the positive testimony of one witness supported by many strong corroborating circumstances, will control the price of slaves as agreed on, against the price they were subsequently sold for at sheriff's sale.

Flower vs. Millaudon, 185

3. Evidence which is inadmissible to prove title, may be received to show possession by known marks and boundaries, which is good to sustain the plea of prescription..... *Broadway's Heirs vs. Pool.* 326

4. A witness testifying to the extra judicial confessions, verbally made, of a deceased person, is the weakest of all testimony; as it cannot be contradicted, or the witness convicted of perjury if he swear falsely..... *Gillispie vs. Day.* 263

5. So, proof by one witness to a single confession of an aggregate amount above 500 dollars is insufficient without some corroborating circumstance; although if the witness testified of his own knowledge to two successive loans, or sums, amounting together to more than \$500, the evidence might be received as sufficient..... *ib.*

6. Positive testimony cannot be destroyed by the negative proof of witnesses who testified that they did not see a certain slave on board defendant's steamboat.

Slatter vs. Holton. 39

7. Ancient plans of a city are admissible in evidence to prove the boundaries of lots sold in reference thereto, and the direction of streets so far as they may extend, although not including the *locus in quo*; and especially when one of the parties claim under those who caused the plans to be made.

Carrollton Rail Road Co. vs. Municipality No. 2. 63

	PAGE
8. The acceptance of accounts by the party to whom rendered is <i>prima facie</i> evidence of their correctness, and it is for him to show errors. The burden of proof is on him.....	196
9. Testimony contained in a deposition must be disregarded which goes to show any thing contrary to or explanatory of a judgment between the parties; but may be proper to prove that one of the parties was in possession of a separate estate.....	198
10. The record of a suit and judgment is admissible in evidence to show it was rendered against a party who had surrendered certain slaves to be sold although it might be insufficient <i>per se</i> to prove she had title to them.....	ib.
11. Acts or deeds under private signature, acknowledged before the mayor of a city are inadmissible in evidence when it is not shown he had authority to take the acknowledgments of witnesses to such acts or deeds.....	ib.
12. The record of a suit pending in the Supreme Court of another State is inadmissible in evidence when it is irrelevant and tends to controvert a judgment between the same parties in this State.....	ib.
13. This court cannot receive as evidence in a case, any thing which the judge <i>a quo</i> states in his opinion to have been proven. An admission of material facts cannot be proved by any mention in the judge's opinion, that such admissions were made.	354
14. Evidence not pertinent to the issue may be admitted and the effect of it be afterwards considered.....	533
15. In a claim for right of ferry, evidence is admissible to show, the land purchased was not worth the price paid, without the right of ferry was attached to it. The effect of it should be considered with other circumstances.....	ib.
16. Where the right of ferry depends on a condition, evidence should be received to show the condition has not been performed.....	ib.
17. The certificate of the commandant, stating that a certain road was made, as required by the condition of a grant of the perpetual right of ferry, is not conclusive, but only <i>prima facie</i> evidence of the fact, which may be contradicted.....	ib.
18. Evidence is admissible to show that a ferry, which is claimed under an exclusive grant from the Spanish government, was in fact kept under the control and supervision of the Police Jury.....	ib.
19. Instruments of writing, such as grants, certificates, &c., are admissible in evidence, without proof of their signatures. They are <i>prima facie</i> evidences; and may be contradicted by showing, that they were not acting in the capacity they purport.....	ib.
20. The transfer of a grant or privilege may be proved by comparison of handwriting, when the signature of the witness is shown to be genuine, and he is dead. <i>ib.</i>	ib.
21. The authority of a deputy clerk to issue an attachment, when denied, should be clearly established by evidence.....	542
22. Conversations between the husband and wife out of the presence of the defendant, who was not privy to the sale or transaction to which they relate, are inadmissible in evidence.....	302
23. Threats and undue influence of the husband, to induce his wife to sign an act of sale of her paraphernal property to B., even if sufficient to annul it	

as between them, cannot affect the rights or be given in evidence against C., a bona fide purchaser from B. *Blanchard vs. Custille*. 362

24. A third person who did not sign a notarial act of sale, although it expresses on its face, that the price was paid by the vendee, in cash, may show by parol evidence, that in fact it was paid partly in cash, which he advanced, and by his note for the balance. *Benoit vs. Bréussard*. 387

25. Where the testimony of the witnesses is contradictory and the evidence nearly balanced, the opinion of the judge *a quo* will have great weight. *ib.*

26. Parol evidence is admissible in contradiction to the written statement of the defendant, intended as a settlement between the parties, and also of title to a slave, under the pleadings alleging fraud. *Brownson vs. Fenwick*. 431

27. Evidence taken down at the instance of the plaintiff, cannot be stricken out, on the cross-examination, on the ground that it contradicted or went to explain a written contract and was inadmissible. The motion to strike it out came too late; the objections should be stated when the testimony is offered.

Huey vs. Drinkgrave. 482

28. Parties are not to be controlled in the order in which they adduce their proofs on the trial: so in the transfer of a note, the defendant may examine witnesses to prove the existence of equities between the original parties affecting the consideration, and afterwards to show by evidence that the plaintiff took the note with a full knowledge of their existence. *Jones vs. Young*. 553.

29. The general rules of evidence established by the Louisiana Code must be considered as applicable to all contracts whatever.

Waters vs. Petrovic & Blanchard. 482

FACTORS AND COMMISSION MERCHANTS.

1. Where factors accept a mandate to receive produce and make insurance on it at the instance of the shippers, they are bound to pay his draft on it, instead of imputing the proceeds to the payment of debts due them by the former owner. They can only apply the surplus of the proceeds of the cargo to their own debts after payment of the draft drawn against it.

Zacharie & Co. vs. Rogers & Harrison. 223.

2. Where a commission is charged for accepting, none can be claimed, or a like commission charged for advancing, on the same sum or transaction.

Taylor, Gardner & Co. vs. Wooten. 518

3. A promise by defendant to send plaintiffs his crop, or in default, to allow them a commission on its amount, having no other consideration than the acceptance of a draft, for which a commission is already charged and allowed, is a *nudum pactum*, and will not be enforced. *ib.*

4. Where the owner of property places it in the hands of a third person who makes advances on it by drawing a bill, the drawee and consignee cannot appropriate it to the payment of his debt against the owner, until the advance is paid.

Zacharie & Co. vs. Rogers & Harrison. 218.

FRAUD AND SIMULATION.

1. Where land is alleged to have been conveyed with a view to give the vendee

an apparent title, to enable him to recover in a petitory action; that the vendors were to have one-half when recovered; and that no price was really paid; such a stipulation can only be shown by a counter-letter.

Delahoussaye's Heirs vs. Davis's Widows and Heirs. 409

2. A simulation not fraudulent cannot be proved by parol, as between the parties; and if fraudulent as to both parties, the law gives no action to enforce such contracts. *ib.*

FREIGHTS AND VESSELS.

1. The freighters of a vessel under charter party, have no claim on the owner for damages, alleged to have been occasioned by the accidents, &c., of the voyage. There is no privity between the freighters, who contract with the charterers, and the owner. *Agricultural Bank of Mississippi vs. Barque Jane.* 1

2. The payment of privileged claims against a vessel, does not subrogate the persons paying, as privileged creditors, when there is no conventional subrogation. *ib.*

3. The master of a vessel, even under charter party, is bound to consult the owner, in the home port, when necessary or extensive repairs are to be made. *ib.*

INJUNCTION.

1. The debtor alone has a right of enjoining proceedings under executory process without giving security. His vendee or the third possessor of the mortgaged property cannot. *Pepper et al. vs. Dunlap.* 491

2. On the dissolution of injunctions the damages should only be estimated on the amount actually due at the time of granting the injunction, or the sum actually enjoined, and not on notes or instalments of the same debt becoming due during the pendency of the injunction. *ib.*

3. The plaintiff in injunction, who is non-suited, is entitled to a suspensive appeal on giving his bond for the amount of the costs, and one half over.

State of Louisiana vs. Judge of the First District. 167

4. In an injunction case to restrain the adverse party from taking out an order of seizure and sale, when the plaintiff is non-suited, a writ of prohibition will be granted to the judge *a quo*, prohibiting him from proceeding to allow the order of seizure, until the party is heard on his appeal. *ib.*

5. Such as the injunction originally was before the judgment of non-suit, so it remains until the appeal is tried; and no proceedings can be had until it is finally decided in the Supreme Court. *ib.*

6. Interest on the dissolution of injunctions cannot exceed ten per cent; if the judgment enjoined bears ten per cent. interest; all above that sum which is allowed must be in the way of damages if the injunction is dissolved.

R. McCarty vs. J. P. McCarty. 300

7. Where a judgment, which is enjoined already, bears interest at ten per cent. per annum, no further interest can be allowed on a dissolution of the injunction. *Smith vs. Brownson.* 313

8. Interest on the dissolution of the injunction may be increased to ten per cent; but whatever else, that may be allowed against the plaintiff and his surety in injunction, should be given as damages. *ib.*

9. On the dissolution of injunctions under the statute of 1831, this court has sometimes allowed as damages, the expenses for professional services, which the creditor enjoined has incurred in setting the injunction aside, when improperly obtained.....*Melançon's Heirs vs. Robichaud's Heirs.* 557

10. The defendant in injunction enjoining his order of seizure and sale, changes the proceedings from the *via executiva* to the *via ordinaria*, when he prays for judgment against the debtor. In cases of this kind no damages should be allowed, and judgment must be given as in an ordinary suit.

McMillen vs. McKerroll et al. 372

11. The courts will not assess damages on a plea in re-convention, in a suit by injunction or sequestration. The party must take his remedy on the bonds given by the plaintiff in injunction.....*Patin vs. Blaize, jr.* 396

12. Damages for the wrongful suing out an injunction may be claimed in the same suit, under the provisions of the act of 1831, in cases embraced by this act; but from its wording it seems to apply particularly where judgments are enjoined..... *ib.*

13. When it appears in the progress of the trial, that a payment is made of part of the debt; although the injunction may have to be dissolved for want of an allegation of payment, yet a new one for the amount should be granted and perpetuated.....*Woodburn vs. Friend et al.* 496

14. Where the party is entitled to a new injunction *instantly* for a part of the debt, on the dissolution of the first, he will not be mulct in damages..... *ib.*

INSOLVENCY.

1. An insolvent debtor may make valid sales of his property at any time before actual insolvency, when no preference is given to any creditor over others.

Crocker, Syndic, &c. vs. Champlin. 12

2. The oath of an opposing creditor is not necessary to his opposition made to the appointment of a syndic.....*Girard et al. vs. Their Creditors.* 246

3. The syndic cannot claim the reversal of a judgment, which reduces his claims on his tableau, and when he and none of the creditors, whom he represents, are aggrieved.....*Ferguson & Hall et al. vs. Their Creditors.* 278

4. So where a creditor's claim is reduced from a privileged to an ordinary one, and he does not appeal, the syndic representing the mass of creditors, who are benefited, cannot appeal or have the judgment altered..... *ib.*

5. A privileged claim of the vendor will not be allowed on the goods of the insolvent, mingled with an old stock, and when they are not identified..... *ib.*

6. Where it is not shown or does not appear, that the insolvent was a merchant or trader, or ever kept any books, he will not be denied the benefit of the insolvent laws, for not depositing any books in court....*Wilson vs. His Creditors.* 33

7. When the evidence of the debt and writ of arrest are produced, it is sufficient to show, the debtor is in actual custody; to entitle him to the benefit of the law for the relief of debtors in actual custody..... *ib.*

8. Where the debtor makes a cession of his property, which has been sequestered, it should be delivered up to the syndic to be sold; the privilege or

	PAGE
claim of the suing creditor being preserved on the proceeds; and the sequestration is consequently cancelled.....	<i>Duclerc vs. Crabassol et al.</i> 91
9. It is necessary to allege and show, that an absconding insolvent debtor was a merchant or trader under the act of 1826, to sustain an action for a forced surrender. The allegation must be made in the pleadings, in order to let in evidence in proof of it.....	<i>Shakespeare et al. vs. Saunders.</i> 97
10. A sale by the father to his son not a creditor, of his estate for a sound price, where there is no privity between the latter and the creditors of his father, and none between the father and the creditors, is valid, although the father was insolvent at the time, and the son agreed and did apply the price to the payment of a portion of the creditors. Nor is the mere relationship of the father and son evidence of fraud.....	<i>Maurin & Co. vs. Rouquer et al.</i> 594

INSURANCE.

1. Where the insured sells the property covered by the policy, and afterwards takes it back on account of the non-payment of the price, and is in possession at the happening of the loss, she will recover, although a clause in the policy provides, it shall be void in case of transfer or assignment, without the consent of the insurers.....	<i>Power, tutrix, &c. vs. Ocean Insurance Company.</i> 28
2. By the implied resolatory clause in her sale, the plaintiff was restored to the possession and ownership of her property before the loss, as if no transfer had taken place.....	<i>ib.</i>
3. It is sufficient if the insured has an interest in the property, at the time of insuring, and at the happening of the loss.....	<i>ib.</i>
4. The bill of lading is sufficient evidence of ownership to entitle the shipper to recover the insurance, even against the testimony of witnesses to the contrary. <i>Page vs. Western Marine & Fire Insurance Co.</i>	49
5. A fair and bona fide sale of damaged property, under circumstances, that render its shipment to the port of destination impossible, except in a very damaged condition, is the best that can be done for all concerned, and the underwriters cannot complain.....	<i>ib.</i>
6. The master of a boat or vessel, whose cargo is damaged by the perils insured against, so as to render its re-shipment inexpedient and unprofitable, has authority to sell it for the best price at the place, and for the benefit of all concerned.....	<i>Vaughan vs. Western Marine & Fire Insurance Co.</i> 54
7. The effect of a valid abandonment of the object or property insured, is to transfer it to the underwriters, who take the place of the insured. <i>Hooper et al. vs. Whitney.</i>	267
8. The underwriters are subrogated to the rights of the insured by the abandonment, which also goes to include the <i>spes recuperandi</i>	<i>ib.</i>
9. So a sale of a vessel at the port of necessity by the master under necessary circumstances, vests the purchaser with a good title. The insured, after abandonment, cannot set up any claim or maintain an action against the purchaser to recover her.....	<i>ib.</i>
10. Memorandum articles are liable to no constructive or total loss, so long as they continue of any value; although they are so damaged as to be rendered	

absolutely of no value, still if they remain *in specie*, or can be designated by the same name, the underwriters are not liable for a total loss. PAGE

Skinner & Kennedy vs. Western Marine & Fire Insurance Co. 273

11. So where a boat loaded with pork in bulk, some flour and beans, was partly consumed by fire, but the bottom floated on to the port of destination, with about 11 per cent. of the cargo of pork; it being much roasted and barbecued, but was still recognized as pork: *Held*, that the insurers were not liable for a total loss... *ib.*

12. The fact of the property of the insured, being purchased by his son at a sale made by the master of the damaged cargo, is not sufficient to prove that the purchase was made on account of his father, or in any manner to affect the validity of the sale. *Vaughan vs. Western Marine & Fire Insurance Co.* 276

13. A competent crew is necessary to the sea worthiness of a boat or ship; but if one is provided, the occasional absence from the vessel of a hand or seaman, on the business of the voyage, does not defeat the policy; especially when his presence would not have prevented the accident.

Caldwell et al. vs. Western Marine & Fire Insurance Co. 48

14. A strong case of necessity is required to justify a master in selling his boat or vessel and cargo, if other means of saving either be within his reach. But where he acts with fairness, and uses all proper diligence to save both, he will be justified by the necessity of the case, in selling both the boat and cargo. *ib.*

15. The master of a boat, whose cargo is materially damaged by one of the perils insured against, is not bound to wait a great length of time, at a heavy expense, to overhaul, repack and reship the cargo, when but little or nothing would be saved. He may exercise a sound discretion and sell it in its damaged state for the best price and benefit of all concerned.

Robertson et al. vs. Western Marine & Fire Insurance Co. 227

16. The purchase of property damaged by the perils insured against, by the owner, who has been insured, is illegal and has the effect of revoking his abandonment, and turning the total into a partial loss, which is all that can be recovered. *ib.*

17. After abandonment the insured becomes the agent of the underwriters, and standing in that relation, he cannot purchase, except with the consent of his principals. The master and owner both become agents of the insurers, on abandonment. *ib.*

18. Custom or usage in the country, of owners buying in their property, when sold as damaged for account of the underwriters, cannot justify *that* which by the law of insurance has been held to be unlawful. *ib.*

INTEREST.

1. Where notes, given for the price of property producing fruits and revenues, are by agreement or otherwise to remain deposited and payment suspended until defects in the title are cured; on their restoration, payment of the interest arising *ex-morâ* will be decreed, as a compensation for the fruits of the thing sold, when it remained in the enjoyment of the vendee.

Ball et al. vs. Le Breton et al. 147

2. The purchaser who wishes to relieve himself from the payment of interest, must avail himself of the faculty given him to *deposit the price* due by him. . . . *ib.*

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3. Legal interest from judicial demand on liquidated claims will be allowed, when the party was first in delay.....*Brownson vs. Fenwick.* 431

INTERVENTION.

1. Intervenor has no right to come in and contest the jurisdiction of the court in which the plaintiff had a right to sue. They must take the case as they find it; and if their interests are effected, it is the result of their own acts.
Kenner & Co.'s Syndic vs. Holliday et al. 154

JUDGMENTS.

1. Judgment affirmed with the maximum of damages for a frivolous appeal.
Kolligs' brothers vs. Meeks. 75
2. A judgment which has become definitive, cannot be set aside by consent of parties, especially when all the parties interested are not present; nor can an attorney deprive his client of the benefit of his judgment without a special power to do so.....*Morgan, Dorsey & Co. vs. Their Creditors.* 84
3. A judgment homologating a tableau of distribution is one in favor of each creditor to whom a dividend is assigned; and has the effect of *res judicata* in relation to the proceeds or money in the hands of the syndic..... *ib.*
4. Judgment affirmed; the record being imperfect, so as to preclude an examination of the case on the merits.....*Beach & Co. vs. Wagner et al.* 86
5. A judgment obtained in the last resort is final and conclusive between the parties to it; although it may not be so as to third persons: nor can a change by the common debtor making a surrender, affect the rights of the judgment creditors, who have a privilege or mortgage on the property ceded.
Skipwith vs. His Creditors. 198
6. In a petitory action when the defendant exhibits the best title, he will be entitled to *final judgment in his favor*, and not merely one of non-suit.
Guidry vs. Woods. 334
7. A judgment which states that it was rendered by *consent* of parties; especially when it does not appear the defendant ever was cited or made a party to the suit, is *illegal*.....*Broussard vs. Broussard.* 354
8. The case depends entirely on facts and calculations made by Auditors and the inferior court, which are approved and judgment affirmed.
Parry vs. Hannon. 395

JURISDICTION.

1. A married woman may sue her tutor, in the Court of Probates, for the balance due her; and maintain the action with the assistance of her husband, on a note given in his name, as her agent, for a part of the sum coming to her.
Thibodeaux vs. Thibodeaux. 439
2. This court will take jurisdiction of a suit for separation from bed and board, although the matter in contestation is not *appreciable in money*, or does not consist in a money demand exceeding 300 dollars.....*Bowley vs. Bowley.* 557
3. The law expressly gives the courts jurisdiction in cases of separation

from bed and board, and in actions of divorce; and this court will not hesitate to act under it, when they have not the slightest doubt of the constitutionality of the law..... 557

JURY.

1. When an important fact which is submitted to a jury, is not positively proved, but only *inferred* from the evidence, their verdict is entitled to great weight, and will not be set aside unless manifestly erroneous.
Vaughan vs. Western Marine and Fire Insurance Co. 54
2. The verdict of a jury in a case depending only on facts will not be disturbed, when not manifestly erroneous.....*Nott & Co. vs. Kirkman et al.* 14

LANDS AND LAND LAWS.

1. Admitting the plaintiffs are owners of the upper end of a larger tract of land, yet if they show no location by an authorized survey embracing the *locus in quo*, they cannot maintain an action even of trespass against a possessor so as to oust or disturb him.....*Hornaby's Heirs vs. M. Dermott.* 304
2. The certificate of purchase from the register and receiver is not final evidence of title out of government, when it is shown the entry and purchase was improperly allowed; although generally such certificates are considered as sufficient evidence of a sale from the government as to form the basis of a petitory action.....*Guidry vs. Woods.* 334
3. The register and receiver are to decide on the fact whether the applicant for a pre-emption is in possession and has cultivated the land within the previous year; but if they undertake to grant a pre-emption to land, which the law declares shall not be granted, they are acting on a subject matter clearly not within their jurisdiction. 46.
4. The commissioner of the General Land Office under the supervision of the secretary of the treasury, has the power to declare what lands, according to law, are liable to entry or location by pre-emption rights or floats; and may cancel the certificate of the register and receiver in this respect. 46.
5. The evidence and deposition of the land commissioner, of cancelling the register and receiver's certificate of land, not liable by law to be sold or entered as pre-emption rights or floats, is admissible in proof of these facts. 46.
6. Fractional townships fronting on water courses are surveyed in small tracts or lots of about 160 acres each, and numbered, but the lot or fractional section numbered 16, is not designated by law as school lands. It is only under the general laws, and where the township is surveyed in square sections that every 16th section is reserved as school land.....*Barton's Executrix vs. Hemphill.* 510
7. In fractional or irregular townships on water courses the secretary of the treasury is required by law to select and designate the school lands. 46.
8. The chief clerk in the general land office, being designated by law to act as commissioner in case of vacancy, &c., he is therefore an officer known to the law, to be recognized as such and presumed to be acting in accordance with law..... 46.

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9. Registers and receivers are to decide on the facts and sufficiency of proof in cases of pre-emption when no fraud exists; but if they sell land exempted from sale by law, their acts are void for want of authority.
Burton's Executrix vs. Hemphin. 510
10. The commissioner of the General Land Office may at least suspend if not annul titles granted by the register and receiver, until Congress or the courts can act. *ib.*
11. The mere statement of the commissioner of the General Land Office that he has cancelled a certificate of purchase given by the register, &c., is not an eviction which should rescind a sale between third parties. *ib.*
12. It is essential to the validity of an entry that the land intended to be appropriated, should be so described as to give notice of the appropriation to subsequent locators. *Patin vs. Blaize, Jr.* 396

LAWS.

1. Remedial statutes or laws have no extra-territorial effect or operation.
Briggs, Lacoste & Co. vs. Campbell. 524
2. The interpretation of contracts depends upon the foreign law; but the remedies by which the obligation resulting from contracts are sought to be enforced, must be according to the forms and law of the place where the remedy is sought. *ib.*
3. The last article (3521,) of the La. Code, which repeals all laws in every case provided for in the Code, itself, applies not in every particular instance or cause, but to every category or class of cases, or subject matter upon which the Code contains express provisions, and abrogates all previous laws on these subjects. *Waters vs. Petrov c & Blanchard.* 524
4. This court has held (in 5 La. Rep. 493,) that part of the act of 1808, relative to proceedings upon prison bonds was still in force, notwithstanding the repealing act of 1823, and the Code of Practice. *ib.*

LEASE.

1. Interest cannot be recovered for rent arrear, from the time it became payable; but only from judicial demand. *Perret et ux. vs. Dupré et al.* 341
2. So a party is not bound to repair the leased premises when it can only be done by erecting new buildings. The adverse party may annul or put an end to the lease. *ib.*

MINOR.

1. The father or mother of a minor, or person in whose charge the minor is left are responsible for the injury he may do to another; but this responsibility is based on the ground that the person having control of him could have prevented the act and did not; and is responsible for neglect.
Cleveland vs. Mayo et ux. 414
2. But where a person, having control of a minor, causes or commands him to commit a crime, or an act causing damage and injury to another, such

person is responsible as having committed the offence, although an irresponsible person has been interposed. *Cleveland vs. Mayo et ux.* 414

3. Where a person has treated with a minor, he cannot plead the nullity of the agreement, when sought to be enforced after the disability has ceased.

Anderson's Administrator vs. Birdsell's Administratrix. 441

MORTGAGE AND PRIVILEGE.

1. A third purchaser of an estate, subject to certain mortgages, which she assumes to pay, cannot set up her own claims in opposition to the mortgage creditor on said estate. *Kenner & Co's Syndic vs. Holliday et al.* 154

2. Where notes are given in renewal of those sued on, although such renewal may not operate a novation, so as to affect the mortgage by which ultimate payment is secured, no recovery can be had until the new notes are produced. *Plucque & Le Beau vs. Perret, &c.* 318

3. The value of the hire and use of slaves, mortgaged and put in possession of the mortgagee, to indemnify him against an endorsement, will be allowed in compensation of the amount actually paid by him as endorser.

Hutchings' Widow and Heirs vs. Johnson's Heirs. 437

4. A mortgage executed by the maker of a note, to secure the endorsers, becomes null when there are no steps taken to fix their liability; and the transfer to the holder of the note after the endorsers are discharged for want of protest and notice, confers no rights on the transferee. *Peets vs. Wilson.* 473

5. The fact of an endorser taking a mortgage from the maker of a note to indemnify him against loss, does not dispense with demand protest and notice. *id.*

NEW TRIAL.

1. A new trial should not be granted, to enable the party to prove the tender of a slave in a redhibitory action, on the ground of an oversight in his counsel to prove it on the trial, when it does not appear, any diligence was used to procure proof. *Houghteling vs. Fisher.* 473

2. The discretion of the Supreme Court, to remand causes for a new trial, will be exercised only in extreme cases, when the party has shown due diligence and is guilty of no *laches*. *id.*

NOVATION.

1. Where notes are given in renewal of those sued on, although such renewal as between the parties may not operate a novation, so as to affect the mortgage by which ultimate payment is secured, yet the plaintiff cannot recover without producing or satisfactorily accounting for the notes given in renewal.

Plucque & Lebeau vs. Perret, &c. 318

OBLIGATIONS.

1. Where persons representing a succession executed their notes to the cre-

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ditor for the original debt due by it and secured by mortgage, their obligation is in the nature of the *pactum constitutum pecunie*, engaging their *personal liability*, that the debt should be paid within a certain time, or the creditor be at liberty to seek payment according to his original right on his mortgage.

McDonogh vs. Relf & Zacharie, Etc. 100

2. If the new obligation be for more than was legally or actually due on the original one, the mistake being discovered, the *pact* or *new obligation* is void *pro tanto* for want of a debt which was the foundation of it. *ib.*

3. The recognition of a debt is always to be understood with reference to a *primordial title*; and if the party is obliged further, or otherwise than as the primary title imports, on showing the error he will be relieved. *ib.*

4. So where R. & Z. being heirs of a succession and administering it as executors, gave their notes to the creditor by the original debt and mortgage, who reserved the right to go upon the mortgage if the notes were not punctually paid, and did so after the payment of the first note; and in which, the debt was ascertained by a judgment to be *much less* than the amount for which the new obligation was given: *Held*, that there was error for this amount, and the new obligation can have no effect. *ib.*

5. BULLARD J. & MARTIN J. *dissenting*. The failure to give notice of the extinguishment of a mortgage, did not forfeit accruing interest; it only authorized a *suspension* of payment. Interest still runs in such a case, although not exigible. *ib.*

6. If it be of the essence of the *pactum constitutum pecunie* that there should be a pre-existing debt, it is only to distinguish it from a donation; but it suffices if the debt, the payment of which is promised, should be due in *foro conscientie*; and that there should exist a just subject for payment, although it may be in *foro legis* declared null. *ib.*

PARTNERSHIP.

1. Where a party has made himself liable to creditors by dealing with the firm, although not a partner, and has been compelled to pay a partnership debt to a creditor, he will recover it back from the firm. *Flower vs. Millaudon.* 185

2. All the partners in a commercial firm must join in an action or obligation due to the partnership; and on the dissolution of the partnership by the death of one of the partners, the surviving ones must join the representatives of the deceased, or obtain authority from the proper tribunal, before they can sue for a partnership debt. *Hyde et al. vs. Brashear.* 409

3. The incapacity of surviving partners to sue without obtaining authority or joining the representatives of the deceased, need not be specially denied. It may be assigned for error. *ib.*

4. The representatives of the deceased partner must be joined, or authority from the Court of Probates obtained, in a suit by the surviving partners, due the partnership. *Babcock, Gardiner & Co. vs. Brashear.* 404

PAYMENT.

1. Compensation and payment must be specially pleaded to enable the de-

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necessary to make proof of either.....	<i>McKown vs. Mathes.</i> 542
2. But an amendment setting up the plea of payment and compensation, comes too late after the trial commences and the jury are sworn.....	<i>ib.</i>
3. A receipt of full payment by the original payee to the maker of a note, offered against the holder, will be disregarded when shown to be collusive, and where it is contradicted by other evidence.....	<i>Bienvenu vs. Segura.</i> 346
4. Where the creditor does not suspend his execution so as to put it out of his power, or the surety (if he pays,) to pursue the debtor, it is no prolongation of the time of payment.....	<i>Woodburn vs. Friend et al.</i> 496

POSSESSORY ACTION.

1. In a possessory action the civil possession of the plaintiff, preceded by an actual and corporal detention of the thing, will suffice, as it allows him the benefit of the previous corporal possession of his author.....	<i>Ellis vs. Prevost et al.</i> 251
2. The court do not recognize the doctrine, that there is but one kind of possession; and that civil possession will suffice in all cases in possessory actions....	<i>ib.</i>
3. Possession is acquired by the actual and corporal detention of the property; this is natural possession or possession in fact; and it is preserved and maintained by the mere will or intention to possess, and this is civil possession or possession in right.....	<i>ib.</i>
4. So where a person is disturbed in his possession, he has the right, within a year and by virtue of his civil possession, founded on his previous corporal and actual possession to institute the possessory action, to recover it.....	<i>ib.</i>
5. The person claiming by possession alone, without showing any title, must prove an adverse possession by inclosures, and his possession cannot extend beyond.....	<i>Ellis vs. Prevost et al.</i> 521
6. Where a citizen peaceably takes possession of a portion of public land or domain, to which no private claim is set up, and improves it, none but the government can disturb him in the possession of what he has actually inclosed. <i>Miller vs. Lelen.</i> 331	
7. Where the vendor and vendee live in the same house, possession follows title.....	<i>Kemper's Heirs vs. Hulick.</i> 349
8. So where the son was possessed of a slave, who was assessed in his name, and lived in the common dwelling with his father at his death, and his widow took the slave with her when she removed: Held, that she was the legal possessor.....	<i>ib.</i>
9. The plaintiff is not bound to show a perfect title to recover against a trespasser without title, provided he has actual possession. When a civil possession is relied on alone, the title must be <i>prima facie</i> , such as would be translativ of property....	<i>Patin vs. Blaize, Jr.</i> 396
10. Title papers are admissible in evidence in a possessory action, to show the extent and limits of the plaintiff's possession; although no inquiry can be had as to the validity of titles in this action.....	<i>Lecomte vs. Smart.</i> 484
11. Where a person takes possession of land under an apparent title as his own, slight acts will be received as evidence of an intention to take actual possession.....	<i>ib.</i>

12. But where a man without any pretence of title, goes upon land claimed by another, he must show unequivocal acts of possession, more than a year, to maintain the plea of prescription.	PAGE 484
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PRACTICE.

1. Signatures to the notes and checks sued on, are admitted by the plea of the general issue.	<i>Beach & Co. vs. Wagner et al.</i> 86.
2. If the pleadings state the non-residence of the plaintiffs, their absence and right of their attorney to make affidavit for them, will be presumed, when the contrary is not alleged or shown.	<i>Austin et al. vs. Latham.</i> 88.
3. It is entirely a discretionary power in the inferior courts, to order a case to be sent before auditors, to facilitate the trial of causes by the investigation of accounts.	<i>Guinault vs. LeCarpentier.</i> 239
4. Where the verdict of a jury appears manifestly erroneous, the cause will be remanded for a new trial.	<i>ib.</i>
5. When the judgment of the court is confined to the points filed or raised in the argument of the case, it will not listen to an application for a re-hearing on other grounds, suggested after the cause has been decided. <i>Caldwell et al. vs. Western Marine & Fire Insurance Co.</i>	48
6. Where the plaintiff failed to make out her case by full proof, the court on consideration, set aside the non-suit and remanded the cause for a new trial.	<i>Barton's Executrix vs. Hemphin.</i> 517
7. In a petitory action, when the defendant exhibits the best title, he will be entitled to final judgment in his favor, and not merely one of non-suit. <i>Guidry vs. Woods.</i>	335
8. It is not enough, that a party renders his rights and claim probable in a court of justice; he must make them legally certain.	<i>Skipwith vs. His Creditors.</i> 198
9. When all the promises and contracts are set out in the pleadings, if any one of them will authorize judgment, the court should render it. Irrelevant or useless matter does not vitiate the good.	<i>Rawls etc. vs. Skipwith et ux.</i> 207
10. The party having the legal title may sue for the benefit of whom he pleases; in the same manner as he might dispose of the funds after judgment, if he sued in his own name.	<i>ib.</i>
11. Where a case is dismissed on an exception in <i>limine litis</i> , the Supreme Court cannot examine it on its merits. It must be remanded for a new trial.	<i>ib.</i>
12. Where the plaintiff makes that hardly probable, which he was bound to make certain, and where there is a verdict against him, he is not entitled to be relieved; but if the verdict is against the defendant, in such a case a new trial ought to be granted.	<i>Barrett vs. Bullard.</i> 281
13. Where the evidence does not support the charges in a physician's bill, the court will give such judgment as may appear reasonable and equitable from the proof and circumstances of the case.	<i>Lefebvre vs. Lastrapes.</i> 353
14. A slight variation in setting out the name of a corporation will not affect the right to maintain the action.	<i>Canal Bank vs. Fisher.</i> 365
15. Persons responsible for a trespass or injury in different capacities need	

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not be joined in the same action, although if liable in the same way, all must be joined as in a joint action.....	<i>Cleveland vs. Mayo et ux.</i> 414
16. Where the quantum of damages is not proved or is left doubtful, the case will be remanded to ascertain them.....	<i>Riggs vs. Duperrier et al.</i> 418
17. After a judgment by default, and answer to the merits, an exception denying the defendant's capacity to be sued as administratrix, is not admissible.	
	<i>Cleavers vs. Burke's Administratrix.</i> 429
18. Where a case comes up on a judgment of non-suit in which there was no trial on the merits, or bill of exception taken, this court cannot go into the merits.....	<i>ib.</i>
19. When a demand is afterwards set up for services growing out of a transaction already settled between the parties, for which no charge was made, and it is not shown the settlement was erroneous, it will be presumed the services were gratuitous.....	<i>Brownson vs. Fenwick.</i> 431

PRESCRIPTION.

1. Evidence which is inadmissible to prove title may be received to show possession by known marks and boundaries, which is good to sustain the plea of prescription.....	<i>Broadway's Heirs vs. Pool.</i> 258
2. The plea of prescription may be filed or amended on the trial, after the plaintiff has closed his evidence. It is a plea favored in law, and may emphatically be filed at any time.....	<i>ib.</i>
3. The possessor of slaves under a just title, in good faith, will be protected by the prescription of five years.....	<i>Blanchard vs. Castille.</i> 362
4. The plea of prescription of one year is not applicable to a workman's account, for work done by the job, and materials furnished, whether it be under a specific agreement or on a <i>quantum meruit</i>	<i>Ariall vs. Fenwick.</i> 413
5. The action on a curator's bond against the sureties is not prescribed by the lapse of one year. It is an action arising <i>ex contractu</i> .	
	<i>Brown vs. Gunning's Curatrix et al.</i> 462
6. Actions to annul a sale, brought by a complaining creditor, for giving an undue preference to a portion of the creditors of the common debtor, are prescribed by the lapse of one year from the date of the sale.	
	<i>Maurin & Co. vs. Rouquer et al.</i> 594

PRINCIPAL AND AGENT.

1. If a person acts merely as agent of his brother-in-law, at the sale of his own property, and in superintending it afterwards, he will not be considered as interested, or his acts viewed as an interference with the property, or an exercise of ownership over it.	
	<i>Vaughan vs. Western Marine & Fire Insurance Company.</i> 54
2. Where the agreement leaves it doubtful whether the agent was entitled to commissions on certain notes received in payment, or only on monies received, and the jury find a verdict in the affirmative it will not be disturbed.	
	<i>Vignie vs. Saulat.</i> 23
3. So where it appeared the defendant gave orders to the intervenors to ship his cotton in their names, it was held that the legal possession and control over	

it remained in him, as owner, through the interposition of these persons, as his agents..... *Hamer & Co. vs. Lawrence et al.* 58

4. An agent to purchase slaves cannot buy from himself, or put one of his own slaves in, so as to charge the principal with his price, or value; and where there was deception inducing him to settle with the agent he will recover back, as having been allowed in error..... *Brownson vs. Fenwick.* 431

PRINCIPAL AND SURETY.

1. The surety who has paid defendant's notes in the hands of a third person without notice of the defence set up, will recover the amount he has paid notwithstanding the eviction and loss of title to the property for which the notes were given. *Gasquet vs. Oakley.* 76

2. The surety in an attachment bond need not be owner of real estate or a freeholder; so that he is solvent and resides within the jurisdiction of the court, it is sufficient *Austin et al. vs. Latham.* 88

3. In an action on a joint obligation when it is shown, two of the parties signed as sureties of the third, any payments made by the principal debtor will be imputed and go to the extinguishment of the debt, and judgment given for the balance, against the principal and sureties *in solido*.

Brander et al. vs. Garrett et al. 455

4. In a suit on a joint note, where it is shown the defendant signed as surety for the other maker; although the obligation be *joint only in its form*, yet the surety is bound for the whole debt, or liable *in solido*.

Roberts & Crain vs. Jenkins. 453

5. The obligation entered into by the principal and his surety, is not a joint one; but on the contrary, each one is bound towards the creditor for the whole, although as between themselves, the entire debt or sum is due by the principal, and can be recovered of him by the surety who pays.

Bonny & Baker vs. Brashear. 383

6. A surety may be sued without his principal..... *ib.*

7. Where the curator fails to comply with his duties, and pay over money, any creditor of the estate may at once resort to his action on the curator's bond against the surety. *ib.*

8. The surety cannot appeal from a judgment against him and his principal, which the latter has already had reversed on appeal. The release of the principal in the judgment, released the surety, although not a party to that appeal.

Brashear vs. Carlin, Curator, &c. 395

9. The obligation of the surety in a curator's bond is that the principal will administer the estate according to law; and his duty requires him to pay all the creditors equally according to their rank.

Brown vs. Gunning's Curatrix et al. 463

10. Judicial sureties are bound *in solido*; so each surety in a curator's bond is liable to the action of the creditors of the estate, for the whole amount claimed. *ib.*

11. Sureties in bonds taken in judicial proceedings are bound *in solido*; being entitled to neither division nor discussion; so several sureties in a twelve months bond are each bound for the whole sum. *Woodburn vs. Friend et al.* 496

PROHIBITION.

1. A prohibition is not a writ of right, but the court may grant it on such conditions as will secure to the party who may suffer by it, sufficient indemnity for the trouble, delay and losses he may unjustly sustain.

State of La. vs. Judge of the First District. 167

2. An oath is not required to a petition for a writ of prohibition, if the truth of the facts stated in it appear from an inspection of the record and proceedings had in the case..... *State of La. vs. Judge of the First District* 174

3. Where, by an error of the Judge *a quo* in refusing to allow a *suspensive* appeal, by authorizing an execution to issue, after being divested of jurisdiction, a writ of prohibition is the proper remedy to correct such error..... *ib.*

4. A writ of prohibition may issue to suspend the action of an inferior tribunal for a time, and until it legally resumes the exercise of its former jurisdiction..... *ib.*

5. The Judge of an inferior court cannot grant an order of seizure and sale after an appeal is taken from *his refusal* to issue the same order, previously applied for. But if *he does*, the proper remedy to arrest his proceedings is by writ of prohibition..... *ib.*

6. The authority to grant writs of prohibition is considered in relation to the constitution, which allows to this court appellate jurisdiction only, and is to be confined to matters which have a tendency to *aid that jurisdiction*..... *ib.*

PUBLIC PLACES.

1. Ancient plans of a city are admissible in evidence to prove the boundaries of lots sold in reference thereto, and the direction of streets so far as they may extend, although not including the *locus in quo*; and especially when one of the parties claim under those who caused the plans to be made.

Carrollton Rail Road Co. vs. Municipality No. 2. 62

2. Where a canal and basin figure on the original plan of a city, but are always used and sold by the proprietors, they will be considered as private property..... *ib.*

3. In order to dedicate property to public use there must be a plain and positive intention to give and one equally plain to accept. The form is not material. *ib.*

REDHIBITION.

1. In a redhibitory action for the rescission of the sale of a slave, a tender or offer to return the slave must be proved at the trial, to have been made before suit..... *Barrett vs. Bullard.* 281.

2. Actual idiocy might, perhaps, be deemed a redhibitory vice in a slave; although not specially named in the code; but such defect would be apparent to an ordinary observer as to bring the case within the article 2494 of the La. Code..... *Briant vs. Marsh.* 391

3. Where the evidence establishes the existence of a redhibitory disease at the time of sale, although not perceptible to ordinary observers, or known to the vendors; yet it is sufficient to authorize a rescission of the sale and return of the price..... *Riggs vs. Duperrier et al.* 418

RES JUDICATA.

1. In judgments of the Supreme Court, the reasoning is less to be regarded, than the final conclusion announced ; so when the decree is positive, without any reservation, it is *res judicata* as to all the matters in dispute.

Plicque & LeBeau vs. Perrelli etc. 318

2. No matter in what form of action or proceeding, whether by petition, exception or intervention the question may have been presented, if the same question once judicially decided between the parties be again agitated, it is sufficient to create the presumption resulting from the *thing adjudged*, and forms a complete bar. ib.

SALE.

1. The adjudication is the completion of a sale, so as to invest the purchaser as owner, and with the right of possession of the thing sold.

Municipality No. 1 vs. Cordevoille & Lacroix. 235

2. So the adjudication entitles the vendor not only to damages for non-compliance, but to an action for the price. ib.

3. The sale is perfect between the parties, and the property is acquired to the purchaser on an agreement between them, as to the object sold and the price, even without delivery. ib.

4. The purchaser may retain the price, when he is in danger of eviction from a previous claim on the property, except where he has been informed of it, before the sale. A claim resulting from an act of the legislature, comes within the exception, as ignorance of it cannot be pleaded. ib.

5. A claim of the Draining Company on land for its improvement, is not adverse or a disturbance of possession. ib.

6. Purchasers cannot complain of the failure of the vendor to pass an act of sale, when it was caused by their own acts, in directing the notary not to give up their notes. ib.

7. When the evidence shows, that the sale from the defendant to the intervenors was only to give the latter a colorable claim to the property (or cotton), the sale was held to be made for the purpose of protecting it from the pursuit of creditors, and void. *Hamer & Co. vs. Lawrence et al.* 58

8. In the sale of property subject to an annual tax, the purchaser takes it subject to all the tax *accruing* after the sale ; the vendor being liable for all due up to the time of sale. *Gourjon, f. m. c. vs. Holmes et al.* 232

9. Where the seizure is made and notice given on the 21st June, and the advertisement is dated the 24th of the same month, it will be considered as one day too early. Three days should intervene between the notice of seizure and the advertisement. *R. McCarty vs. J. P. McCarty.* 300

10. The sale of real property cannot be legally made by the sheriff until the 34th day after seizure. But if this time is given, it cannot be objected that the advertisement was posted up a day or two sooner than was required. ib.

11. A clerical error in the description of a piece of land in the sheriff's advertisement of the sale, not calculated to mislead the party interested, is immaterial. ib.

12. Where a party shows a judgment, execution, sheriff's return thereon,

and deed of sale, it is *prima facie* evidence of a valid alienation; and the party attacking the sale must show the forms of law have not been complied with.

Walker vs. Allen et al. 307

13. If a purchaser at sheriff's sale does not offer good security, the sheriff must sell again immediately. If he gives any delay, it is at his own risk and he will be liable in damages to the plaintiff in execution, if any are sustained in consequence of such delay. *ib.*

14. The vendee in a conditional sale or *vente à réméré*, has a greater analogy to a usufructuary than to any other bailee of the property of another, as regards the fruits or increase. *Patterson vs. Bonner.* 508

15. Neither the usufructuary or vendee in a sale *à réméré*, can make the children or young of slaves, born during their possession, *their own*. *ib.*

16. Where there are ambiguities in the boundaries and corners of a tract of land in controversy, between the defendant and plaintiffs, as vendor and vendees, occasioned by leaving blanks in the notarial act of sale, a private act previously executed between the same parties, will be received in evidence to explain and show the true boundaries and corners, when it is not inconsistent with the notarial act. *Labauze et al. vs. Declouet.* 376

17. Where a tract of land is sold as "*4 arpents front with about 35 or 40 in depth*," the front to begin at a certain point, and the tract is *bounded on both sides* by plantations, it is a sale *per aversionem*; and the boundaries will control the enumeration of quantity. *Prejean vs. Giroir et al.* 422

18. A sale by the father to his son, not a creditor, of *his estate*, at a sound price, where there is no privity between the latter and the creditors of his father and none between the father and his creditors, is *valid*, although the father, was insolvent at the time, and the son agreed and did apply the *price* to the payment of a *portion* of the creditors. Nor is the mere relationship of the father and son, evidence of fraud. *Maurin & Co. vs. Rouquer et al.* 594

19. The sale would be good as to the son, even if it was the intention of the father to defraud his creditors, because the contract of sale was onerous and the purchase made for the full value of the property. *ib.*

SEPARATION FROM BED AND BOARD.

1. Living unhappily together; having frequent differences, ebullitions and displays of temper, but without any personal or other violence; the want of supplies or necessities according to the wife's demands; the non-payment of her bills promptly, and for the education of her daughter; the want of support according to her rank and fortune she brought into marriage, and supposed impossibility of the parties ever living together again, are not sufficient *causes of separation from bed and board*. *Rowley vs. Rowley.* 557.

2. During the pendency of a suit of the wife for a separation from bed and board, the wife may leave the home assigned her as a residence, on business, and be temporarily absent. *ib.*

3. A judgment for alimony may be given, even when no separation from bed and board follows. *ib.*

4. The court may, in its discretion, change the residence of the wife during the pendency of her suit for separation. *ib.*

SERVITUDE.

1. The lower one of two adjacent estates, owes a servitude to the upper one, of allowing the waters to pass off from the latter through the natural drains over the land of the former..... *Hays vs. Hays*. 351
2. If the proprietor of the lower estate obstructs the natural flow of the waters of the upper estate he will be compelled to remove such obstructions at his cost. *ib.*

SLAVES.

1. A slave held by a deed of trust or mortgage, which is not recorded in this State, to which the slave has been removed, is liable to seizure by a creditor of the original owner..... *Zollikoffer vs. Briggs, Lacoste & Co.* 521
2. Slaves held under a sale with the equity of redemption existing, are not liable to the seizure of a creditor of the original owner. He can seize only the equity of redemption..... *ib.*

SUCCESSIONS.

1. Where a claim against an estate is unliquidated, or the curator objects and refuses to approve it, the party may sue on it in the Court of Probates; but he cannot have execution immediately, as it must be paid concurrently with other creditors..... *Anderson's Administrator vs. Birdsall's Administratrix*. 441
2. Claims against estates in the course of administration, bear legal interest from the time they are due and payable, although unliquidated..... *ib.*
3. Where a party having two capacities, takes possession of property of a succession, and it is doubtful in which capacity he holds, the legal presumption is that he takes in the capacity the law authorizes, and that he will do what it is his duty to do..... *Selby vs. Bass et al.* 499
4. So where the widow causes an inventory to be made of her deceased husband's estate, and omits to put some articles in it; renounces the community, but acts as administratrix and as tutrix of her minor children; and then as executrix under a will found, and pays some debts without the order of the judge, she is not liable as intermeddler, when there is no attempt at concealment or fraud shown..... *ib.*

TAXES.

1. Oppositions to the valuation and assessment of property in the city of Lafayette must be made within the time prescribed and advertised, or they will not be listened to in court..... *Council of Lafayette vs. Kohn*. 94
2. The assessment roll is admissible in evidence, to show that taxes were duly assessed. If defendant objects, that it is not the true one, he should show it, and call for the right one..... *ib.*

THIRD PURCHASER.

1. A third purchaser of an estate subject to certain mortgages which he as-

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- sumes to pay, cannot set up her claims in opposition to the mortgage creditor on mid estate. *Kenner & Co.'s Syndic vs. Holliday et al.* 154
2. The creditors of an estate are not bound to give security to the purchaser before coming on him for their claims due by it, on the ground that he is in danger of eviction. The right to call on a party to give security implies a warranty against eviction. *ib.*
3. A third person contracting to pay the debt of another and receiving property out of which it was to be paid, cannot oppose the plea of usury, or go into the consideration of that debt, and retain the means placed in his hands to pay it. *ib.*
4. Where the purchaser is actually disturbed in the possession and enjoyment of the thing sold, he can require security before the payment of the price can be demanded. *Ball et al. vs. Le Breton et al.* 147
5. A bona fide purchaser, without notice, is not affected by fraud in his vendor, who has a legal title to the property sold. *Blanchard vs. Castille.* 362
6. A third person who did not sign a notarial act of sale, although it expresses on its face that the price was paid, by the vendee in cash, may show by parol evidence, that in fact it was paid partly in cash, which he advanced, and by his note for the balance, *Benoit vs. Broussard.* 387

USURY.

1. A person contracting to pay the debt of another, and receiving property out of which it was to be paid, cannot oppose the plea of usury; or go into the consideration of the debt, and retain the means placed in his hands to pay it.
Kenner & Co's Syndic vs. Holliday et al. 154
2. Usurious interest which has been paid, cannot be recovered back. *ib.*
3. Where A gave his note to B for \$11,000 payable in 2 years, and received in payment the note of a third person endorsed by B, for \$10,000 payable ten days after his own: *Held*, that it was an agreement to give and receive usurious interest and null. *Flower vs. Millaudon.* 185
4. An agreement to take even a legal rate of interest, on a larger sum than is really due, is usurious. *ib.*
5. So an agreement to make cash advances at 10 per cent. interest thereon, and to receive one third of the profits of the firm to which the advance was to be made, was held to be usurious. *ib.*
6. Accounts which have not been objected to and received by the party, although they contain extravagant charges and usurious interest, will not be re-opened in a suit for a final settlement. Usurious interest once paid cannot be recovered back. *ib.*

WARRANTY.

1. According to the provisions in articles 379, 380 and 381 of the Code of Practice, the vendee of a slave, when sued for the price, will be allowed time to site in warranty the person to whom he sold, and who promised to pay the debt, although the plaintiff, or original vendor, never accepted him as his debtor. *Brown's Executor vs. Copley & Jenup.* 473

WITNESS.

1. The rule in relation to the competency of witnesses is to be governed by the *lex fori*, with some exceptions, in favor of the local law.

Buckner, Stanton & Co. vs. Watt. 211

2. A statute which expressly excludes the drawer of a bill from being a witness in a suit by the holder against the endorser, will not be construed to apply to the *acceptor*. This law being in derogation of the settled rules of evidence will not be extended beyond its letter..... *ib.*

3. So an acceptor who is without interest in a suit by the holder against the endorser of a bill, is a competent witness..... *ib.*

4. The guarantor of a note is a competent witness on the part of the maker, in a suit by the endorsee against the latter; for it is the interest of the witness that the plaintiff should recover, and he is called to testify against his own interest..... *Shipmans & Co. vs. Archinard.* 471

5. So where the plaintiffs received the note sued on *after maturity*, the defendant may produce the letter of the payees and original holders, to show that the suit is premature, and that a *certain time* had been allowed for payment. *ib.*

6. The competency of witnesses is a distinct subject of legislative enactment. It is expressly and precisely treated of by the Code, (article 2260;) and it lays down all the great and leading principles of the law of evidence.

Waters vs. Petrovic & Blanchard. 524

7. The article 2260 declaring who shall be a competent witness to prove any covenant or fact whatever, in civil matters, makes no exception of any particular covenant or fact whenever parol evidence is admissible under the provisions of the Code; and the act of 27th March, 1823, so far as it renders the maker of a note, &c., an *incompetent witness* in an action against the endorser, is *repealed*, by the last and repealing article of the Louisiana Code. *ib.*

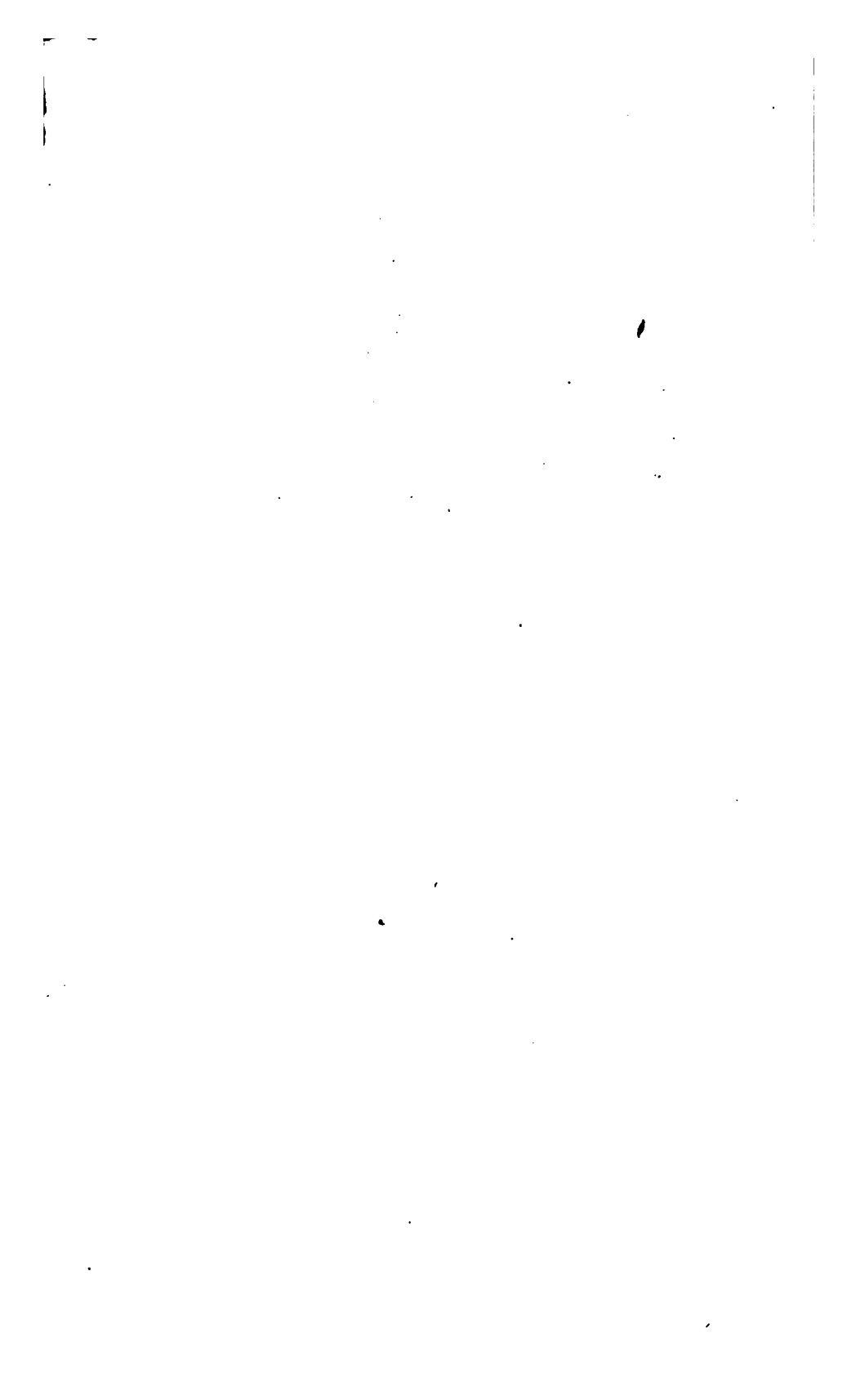
8. The repealing act of 1823, left in force the Louisiana Code, and also the law respecting the competency of witnesses; leaving the question still open, as to the competency of makers of notes, &c., to be witnesses, &c., to be determined by the Code or act of 1823..... *ib.*

9. A notary public, who is the son of one of the endorsers on a note, is not thereby rendered incompetent to make a protest and give notice to all the parties..... *ib.*

10. A sheriff, who is the son of the plaintiff, in execution, is nevertheless competent to execute it..... *ib.*

11. So the grand-father of a legatee is a competent witness to a Will. The official act may be valid, and yet the public officer, be incompetent as a witness in any controversy growing out of the act..... *ib.*

B. B. B.



54-5-10

